United States Court of Appeals

for the Second Circuit



BRIEF FOR APPELLEE

76-5013

To Be Argued By:
Theodore Gewertz

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-5013
Bankruptcy No. 75 B 1735

In The Matter Of W. T. GRANT COMPANY,

Bankrupt,

BALTIMORE GAS AND ELECTRIC COMPANY,

Petitioner-Appellant,

-v-

CHARLES G. RODMAN, Trustee of the
Estate of W.T. GRANT COMPANY, Bankrupt,

Respondent-Appellee.

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

On Appeal From The United States District Court
For The Southern District Of New York

BRIEF OF RESPONDENT-APPELLEE

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U.S. DISTRICT COURT FILED MAR 3 1976 S.D.C.F.N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re

HARTFIELD-ZODYS, INC., et al.,
KARL'S SHOE STORES, LTD., et al.,

Debtors,

Arrangement Nos.
74 B 1633-1634

NEW YORK TELEPHONE COMPANY,

Plaintiff-Appellant

- v. -

HARTFIELD-ZODYS, INC.,

Defendant-Appellee

#43983

FILED
MAR 8 1976
JOHN J. GALGAY
Bankruptcy Judge

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LAWRENCE W. PIERCE, D.J.

OPINION AND ORDER

Appellant New York Telephone Company brings this appeal from a decision of Bankruptcy Judge John J. Galgay

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dated March 12, 1975 and the accompanying order of that court dated April 25, 1975. The issue on appeal is whether the bankruptcy court has jurisdiction to restrain New York Telephone from discontinuing service and to determine the amount of a deposit tariff, if any, to which the appellant is entitled. Finding no error, the Court affirms the decision below.

Hartfield-Zodys, Inc., Debtor and Defendant-Appellee herein filed a petition under Chapter XI of the Bankruptcy Act on November 15, 1974. On the same date the bankruptcy court issued a temporary restraining order which required, inter alia, that New York Telephone continue to furnish the debtor with telephone service. Hartfield-Zodys was permitted to operate its business as a debtor-in-possession, a status which it retains to this date.

On the day of the filing, New York Telephone, pursuant to a discretionary power granted to it by the New York State Public Service Commission (see P.S.C. Tariff No. 800 §1(H)) demanded a security deposit of $26,000 to secure the payment of service charges by the debtor-in-possession. Said amount was equal to two months average charges billed to the former debtor for the six months which

preceded the Chapter XI filing. Subsequently, the debtor offered and, with the approval of the bankruptcy court, paid to New York Telephone a deposit of $13,000.

Thereafter the telephone company petitioned Judge Galgay for an order dissolving the restraining order against it and allowing New York Telephone to discontinue service unless the debtor pays a $26,000 deposit. The telephone company argued that the bankruptcy court lacked jurisdiction to deal with the matter, asserting that federal jurisdiction is limited to "the debtor and his property, wherever located." (11 U.S.C. §711.) It was and remains the position of appellant that the new debtor-in-possession has no property interest in the continuation of old service; see Slenderella Systems of Berkley, Inc. v. Pacific Telephone & Telegraph Co., 286 F.2d 488 (2d Cir. 1961). Further, appellant asserts that the debtor-in-possession is a new entity and is entitled to telephone service only upon the same terms as any other customer.

Judge Galgay rejected the arguments of the phone company, relying upon that portion of the Bankruptcy Act which grants to courts of bankruptcy "such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title . . . ." (11

U.S.C. §11(a)). The court reasoned as follows:

> "The flow of money from the debtor-in-possession's bank account necessarily comes under the control of the Bankruptcy Court attempting to administer a plan of arrangement . . . .
>
> "It stands to reason that where a Bankruptcy Court has determined that the continued use of telephone service is necessary for the rehabilitation of the [debtor-in-possession], the court, pursuant to its duty to oversee the flow of a [debtor-in-possession's] funds, may determine what is a reasonable deposit. Further, the court may use its equitable powers under the Act to permanently enjoin the telephone company from discontinuing service so long as it has received a deposit and the [debtor-in-possession) pays its bills promptly." (Opinion Below at 3-4)

In reaching his decision, Judge Galgay relied primarily upon two cases which presented similar circumstances. See In re Penn Central Transportation Co., 467 F.2d 100 (3d Cir. 1972); In re Vogue Instrument Corp., 73 B 921 (E.D.N.Y. November 23, 1973) (Parente, Bankruptcy Judge).

The judge also considered the matter of the deposit in the context of the debtor's overall rehabilitation, which had involved the payment of some $575,000 in similar security deposits. To protect the interests of the telephone company, the judge directed that if the debtor should fail to make payments within ten days of receipt of bills, then the telephone

company could demand an additional security deposit of $5,000 without further order of the court.

On appeal, the telephone company asserts that its deposit tariffs are reasonable and valid, that the New York State Public Service Commission has primary jurisdiction over such matters, that the debtor-in-possession, as a "new entity" has no property right in continued service, and that the bankruptcy court's order was improper in that the judge below should have abstained on grounds of comity.

The Court begins with the accepted proposition that the powers of the bankruptcy court are broad and that equitable principles govern the exercise of bankruptcy jurisdiction. See Bank of Marin v. England, 385 U.S. 99, 103 (1966). To aid in the exercise of this jurisdiction, the bankruptcy court may, in its discretion, employ the device of the injunction; see Foust v. Munson Steamship Lines, 299 U.S. 77, 83 (1936). These powers are employed to assist in "the fundamental purpose of reorganization proceedings to enable the debtor to continue operations as well as to protect the rights of creditors . . . ." In re Yale Express Systems, Inc., 384 F.2d 990, 991 (2d Cir. 1967); see Perez v. Campbell, 402 U.S. 637, 648 (1971).

The Congress, pursuant to its constitutional powers, has long exercised its right to establish uniform laws on the subject of bankruptcies; the Bankruptcy Act thus vests the bankruptcy court with the power "to issue an injunction when necessary to prevent the defeat or the impairment of its jurisdiction." Continental Bank v. Rock Island Ry., 294 U.S. 648, 675 (1935).

The Court does not dispute appellant's first two contentions, that deposit tariffs such as presented here are reasonable and valid and that, in most instances, the state regulatory agencies have primary jurisdiction over their administration. See Southwestern Tel. & Tel. Co. v. Danaher, 238 U.S. 482 (1915); Wood v. Public Utility Commission, 4 Cal. 3d 288, 481 P.2d 823, appeal dismissed, 404 U.S. 931 (1971); Margolis v. New York Telephone Co., 27 App. Div.2d 595, 275 N.Y.S.2d 678 (3d Dept. 1966). Further, the reasonableness of practices such as tariff deposits required by a public utility is a well-established aspect of the jurisdiction of the Public Service Commission. See Jacob Goodman & Co. v. New York Telephone Co., 285 App. Div. 404, 137 N.Y.S.2d 797 (1st Dept.), aff'd, 309 N.Y. 258, 128 N.E. 2d 406 (1955).

However, appellant's argument that these cases operate to preclude the exercise of bankruptcy jurisdiction is not persuasive. As noted, the power of the bankruptcy court is broad and its jurisdiction must encompass that which is necessarily incident to the exercise of its special powers. While appellant does cite one case which held telephone tariff deposits beyond the reach of bankruptcy jurisdiction, Chemical Lime Co. v. West Penn Power Co., 24 F.Supp. 217 (M.D. Pa. 1938), the Court considers the more current decision of the Fifth Circuit to be controlling:

> "[T]he tariffs and related laws are no different from any state law granting a party a right against a debtor . . . . The telephone company has offered no cogent reason why it should be treated differently. Before the filing of the petition, it had certain rights under state law. After the filing of the petition, the demands of the bankruptcy laws take precedence. If a creditor, like the telephone company, could continue to enforce his state law rights after the initiation of bankruptcy proceedings, the bankruptcy laws would be meaningless. Their very purpose is to suspend the normal operation of rights and obligations between the debtor and his creditors." (In re Fontainebleau Hotel Corp., 508 F.2d 1056, 1059 (5th Cir. 1975))

Indeed, it is clear from other recent decisions that the federal court rather than the state agency is the appropriate forum for the determination of what security

deposits, if any, a public utility may require of a party undergoing federal bankruptcy proceedings. This is so despite the general principle that state regulatory agencies have primary jurisdiction over utilities such as the appellant. See, e.g., In re Penn Central Transportation Co., 467 F.2d 100, 103-04 (3d Cir. 1972).

Appellant's third contention, that bankruptcy jurisdiction is not present because the debtor-in-possession has no property interest in the continuation of old service, fails for two reasons. First, the decision which appellant contends controls, Slenderella Systems, supra, cannot be said to stand for such a broad proposition. In that case the Circuit Court held that a debtor-in-possession has no continuing property interest in the bankrupt's former telephone number, as distinct from an interest in telephone service; see 286 F.2d 488, 489. The distinction between a telephone number and telephone service is not a fine one. There are reasons why the telephone company might wish to prevent the vesting of a property right over a specific telephone number in any one customer. However, telephone service is a vital adjunct to any business; as the judge concluded below, the continued use of telephone service is necessary for the rehabilitation of the debtor.

"It is a basic maxim that the term 'public utility' implies a public use, carrying with it the duty to serve the public . . . . Concomitant with the utility's duty to serve is the customer's right to that service." (In re Securities Investment Properties, Inc., B74-2506A at 14 (N.D. Ga. July 9, 1975) (Bankruptcy Court))

Recent decisions in other circuits indicate that the continuation of utility services is important to the rehabilitation of debtors such as appellee herein. See In re Fontainebleau Hotel, supra, 508 F.2d 1056, 1059; In re Penn Central Transportation Co., supra, 467 F.2d 103-04.

While the Court does not accept appellant's argument that a debtor-in-possession has no continuing property interest in telephone service so as to furnish jurisdiction under 11 U.S.C. §711, it notes that the bankruptcy court also relied on its plenary grant of jurisdiction over the business of the debtor under 11 U.S.C. §11 to fulfill "its duty to confirm the arrangement or plan and to release a debtor strong enough to go again in the business world and survive." See In re Lawrence Products Co., 211 F.Supp. 301 (D. Ala. 1962).

Pursuant to this rationale, the bankruptcy judge concluded that jurisdiction was present over the flow of money

from the bank account of the debtor-in-possession, noting that appellant is by no means the sole utility holding the debtor's money for security reasons. Judge Galgay quoted language from a recent decision of the Third Circuit which this Court also considers instructive.

> "If [the appellant] is entitled to require a security deposit, then so are all of the other 40-odd utilities which furnish substantial amounts of power to the [debtor]; yet requiring such deposits would likely make it financially impossible for the [debtor] to operate at all . . . ." (In re Penn Central Transportation, supra, 467 F.2d at 103, quoting the opinion of the district court)

Accordingly, the result reached below can be upheld upon two alternate grounds. First, the Court concludes that the bankruptcy court had jurisdiction under 11 U.S.C. §711 over the property interest held by the debtor-in-possession in the continuation of telephone service. In re Securities Investment Properties, supra. Second, the Court agrees with the court below that jurisdiction is present pursuant to the Bankruptcy Act's grant of plenary jurisdiction under 11 U.S.C. §11. Under this rationale, the bankruptcy court exercised jurisdiction over the "flow of money from the debtor-in-possession's bank account." Under either rationale, the judge below acted to protect an important

property interest of the debtor pursuant to his statutory responsibilities under federal law.

In light of these considerations, the Court concludes that the order of the bankruptcy judge did not constitute an unwarranted interference with matters usually within the jurisdiction of state regulatory agencies. Nor did the bankruptcy judge act where abstention was called for.

The Court concludes that the bankruptcy court acted within the ambit of its jurisdiction and that it properly restrained the telephone company from terminating service to the debtor so long as the bills are paid. The arrangement whereby the debtor was required to deposit one month's security and whereby the debtor is required to pay its bills within ten days or face a $5,000 additional deposit tariff is fair and reasonable and serves to further the purposes of bankruptcy administration.

The decision of the bankruptcy court dated March 12, 1975 and the accompanying order dated April 25, 1975 are affirmed.

SO ORDERED.

Dated: New York, New York
February 26, 1976

LAWRENCE W. PIERCE
U. S. D. J.

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BRIEF OF RESPONDENT-APPELLEE
CHARLES G. RODMAN, TRUSTEE OF
THE ESTATE OF W. T. GRANT
COMPANY, BANKRUPT

Statement of Issues Presented

1. Did the bankruptcy court wherein the Chapter XI arrangement proceeding of W.T. Grant Company ("Grant") was pending have jurisdiction to enjoin appellant utility company ("BG&E") from terminating gas and electric service to Grant by reason of Grant's refusal to comply with BG&E's demand that Grant, as debtor-in-possession, furnish BG&E with the maximum two months' security which BG&E was authorized to request, where compliance with such demand and similar demands made by the many other utility companies serving Grant would have seriously threatened the prospects of a successful rehabilitation proceeding under Chapter XI?

2. Assuming that such an injunction was within the jurisdiction of the Chapter XI court, could such court condition the issuance of the injunction upon the posting by Grant of security equal to one month's billings, a direction to Grant that it pay BG&E's current bills within 10 days following receipt thereof, and the posting of an additional security deposit without further order in the event current payments were not made when due?

3. Does 28 U.S.C. § 959(b) require that a Chapter XI debtor-in-possession, as a condition to the receipt of continued utility service, comply with a demand for a security deposit made by a utility company where the tariffs of the utility company, adopted pursuant to state law, authorize, but do not require, the utility to request such a deposit from its customers as a condition to continued service?

4. Should the appeal of BG&E be dismissed as moot where Grant was adjudicated a bankrupt on April 13, 1976, no longer operates the stores as to which security deposits were demanded and no longer uses any utility service furnished by BG&E and where all BG&E's charges to Grant for services rendered to Grant as debtor-in-possession prior to adjudication were either paid or can be fully covered by the existing security deposit?

Statement of the Case

BG&E appeals from the order of the United States District Court, Southern District of New York (Hon. Constance B. Motley), entered on February 20, 1976 (A 129-143)*, which order affirmed the order of the Hon. John J. Galgay, Bankruptcy Judge, entered on November 17, 1975 (A 120-122), granting in part and denying in part BG&E's petition (A 33-41) to rescind previous orders of Judge Galgay enjoining BG&E from discontinuing gas and electric service to Grant as debtor-in-possession in Chapter XI proceedings, or alternatively, providing for the continuation of such service contingent upon the posting of a security deposit of $56,017, representing two months' estimated billings. Specifically, the order of the Chapter XI court: (a) directed Grant to

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* References bearing the prefix letter "A" are to the Joint Appendix herein.

furnish BG&E with a deposit of $28,009, representing one month's estimated billings, subject to modification from time to time in accordance with actual billing experience; (b) enjoined BG&E from terminating gas and electric service to Grant subject to the condition that Grant make payment for current bills within 10 days of receipt; and (c) in the event Grant failed to make current payments when due, directed Grant, as a further condition to receiving continued gas and electric service, to post an additional deposit of $10,773 or a sum equal to 5/13 of the amount then on deposit with BG&E.*

Statement of Facts

Appellee deems the Statement of Facts contained in BG&E's brief to be incomplete and argumentative. Accordingly, the present Statement of Facts will set forth the relevant facts as established before the Chapter XI court.

At the time it filed a petition for an arrangement under Chapter XI of the Bankruptcy Act on October 2, 1975, Grant was engaged in the business of operating and

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* As shown at p. 8, infra, the Chapter XI court's order was based upon its previous decision involving a similar demand by the New York Telephone Company in the Chapter XI proceeding involving another retail chain, Hartfield-Zodys, Inc. The 5/13 fraction arose from the insistence of BG&E that the order herein scrupulously adhere to the order in the Hartfield-Zodys case, which required the debtor there to post an extra $5,000 deposit in addition to the $13,000 one month's deposit, in the event it failed to make current payments when due.

managing approximately 1,070 stores for the sale of general lines of merchandise, located in 40 states (A 1-2). During its fiscal year ended January 30, 1975, Grant had sales of $1,761,952,000, making it the 6th largest retail business in the United States, exclusive of supermarket chains, and the 17th largest retail business overall. Grant also had over 62,000 employees (A 2).

On the same date that it filed its Chapter XI petition, Grant was authorized by order of the Chapter XI court (the "D.I.P. Order") to operate and manage its business as debtor-in-possession (A 24-30). At the commencement of the Chapter XI proceedings, Grant had dealings with literally hundreds of utility companies; its utility bills averaged approximately $3,000,000, of which BG&E's bills averaged $28,000, or less than 1% (A 51).

The continued operation of Grant's business was dependent upon its ability to obtain electricity, gas, telephone and other utility services, and it was clear that without the continuation of such services, Grant would have been unable to continue its business operations (A 8). Since a number of utilities had threatened to terminate such services unless Grant made additional security deposits

(A 8), Grant, upon its representation that it intended to pay all Chapter XI utility bills on a current basis (A 9), sought and obtained the following provision in the D.I.P. Order:

> ORDERED that all persons, firms and corporations be and they hereby are, enjoined from disturbing or interfering with utility services, including, but not limited to, the furnishing of gas, electricity, water, telephone (present telephone numbers) or any other utility of like kind furnished by debtor and are hereby enjoined from cutting off or discontinuing any such utility services to the debtor-in-possession except upon further order of this Court; * * * . (A 27)

Upon the filing of the Chapter XI petition by Grant, numerous utilities, including BG&E, requested security deposits from Grant in amounts to which such utilities claimed to be entitled under their respective tariffs. The amounts sought were invariably represented to be approximately two months' estimated billings -- the maximum deposit which such utilities were entitled to request under their tariffs* (A 33-34, 52, 73, 83-84).

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* Such estimates were often computed under formulas weighted to give greater effect to months of peak service usage and in many cases the estimates substantially exceeded Grant's average two-month consumption.

In light of the above, Grant determined that if it acceded to the security deposit demands of its utility companies, the drain on its cash resources which such deposits would entail would severely endanger its chances for a successful arrangement under Chapter XI (A 51). Thus, had Grant posted a two months' deposit with each utility company with which it had dealings, its cash resources would have been depleted by $6,000,000 (A 51, 78). At the time the deposits were demanded, the need for Grant to conserve its cash resources was especially acute, in view of its need to obtain merchandise for the then impending Christmas and Easter seasons and its inability to obtain goods under normal credit terms (A 51-52, 104). The courts below recognized that the cumulative effect upon Grant's operating funds of requiring a two months' deposit for every utility which demanded such a deposit would have been devastating (A 116-117, 137).

Subsequent to the entry of the D.I.P. Order, and notwithstanding the injunctive provision thereof set forth above, counsel for BG&E notified counsel for Grant that BG&E had determined to discontinue utility service to Grant (A 42). Faced with BG&E's announced intent to flaunt the general injunction contained in the D.I.P.

Order, Grant, on October 20, 1975, obtained an ex parte order (1) confirming the general injunction and making it specifically applicable to BG&E, (2) ordering that willful violation of the D.I.P. or October 20, 1975 orders by BG&E would furnish the basis for a contempt proceeding against BG&E and (3) further ordering that upon any such violation, BG&E would be held liable to Grant for appropriate consequential, incidental, punitive and exemplary damages (A 42-43).

On October 24, 1975, BG&E moved by order to show cause to rescind the injunctions against termination of utility services to Grant and to require that Grant furnish the requested $56,017 deposit as a condition to continuance of service (A 31-47). The motion came on to be heard before Bankruptcy Judge Galgay on October 29, 1975. After hearing counsel for Grant and BG&E, the Court adjourned the matter with a request that the parties seek an accommodation acceptable to both sides (A 72-80). Although a number of avenues of settlement were explored, including a deposit of less than two months' and payments in advance of estimated billings (A 79-80), those efforts proved unsuccessful (A 112-113, 117-118). On November 5, 1975, in open court, Judge Galgay ruled that Grant should

make a deposit in the amount of one month's estimated billings and directed Grant to pay BG&E's current bills within 10 days following receipt thereof, in the manner prescribed in his prior decision in Matter of Hartfield-Zodys, Inc., No. 74 B 1633 (S.D.N.Y. March 12, 1975) (A 116-118), aff'd ___ F.Supp. ___ (S.D.N.Y. February 26, 1976) (Pierce, J.).* An order to that effect was entered on November 11, 1975 (A 120-122). On February 20, 1976, Judge Galgay's order was affirmed by Judge Motley (A 129-143). This appeal followed.

On April 13, 1976, subsequent to the filing of the notice of appeal herein, Grant was adjudicated a bankrupt and Charles G. Rodman duly qualified as trustee of the estate of Grant. Prior thereto, pursuant to an order of Judge Galgay dated February 12, 1976, Grant had ceased its retail operations at the premises serviced by BG&E, and by letters to BG&E dated March 26, 1976 and April 16, 1976 requested termination of all service as of April 1,

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* Copies of the opinions of Bankruptcy Judge Galgay and District Judge Pierce in the Hartfield-Zodys case are annexed hereto as Exhibits "A" and "B", respectively. Permission to include such cases and the other cases annexed hereto was granted by order of this Court dated May 25, 1976.

1976, with respect to certain stores, and April 23, 1976 with respect to the remainder, and for final billing. It has been ascertained that all BG&E's charges to Grant for services rendered to Grant as debtor-in-possession (and to the Trustee for a short period after adjudication) were either paid or can be fully covered by the existing security deposit.

Summary of Argument

In affirming the Bankruptcy Judge, the District Court rejected each of the arguments raised by BG&E. Thus, insofar as the arguments which BG&E continues to press on the instant appeal are concerned, the District Court held: (a) that the Chapter XI court had jurisdiction to enjoin BG&E from terminating service, notwithstanding Grant's refusal to post the requested two months' deposit (A 135-136, 138-139); (b) that the Chapter XI court had jurisdiction to determine the amount of a reasonable deposit to protect BG&E, consistent with that court's duty to afford Grant an opportunity for rehabilitation pursuant to Chapter XI (A 135-139); and (c) that 28 U.S.C. § 959(b), which requires a debtor-in-possession to manage its property according to the requirements of valid state law, did not mandate that Grant, in order to obtain continued gas and electric service, post

the maximum two months' deposit that BG&E was authorized, but not required, to seek under its tariffs enacted under the authority of state law (A 133-135).

As will be demonstrated below, these conclusions of the District Court were eminently correct.*

Argument

POINT I

THE CHAPTER XI COURT HAD FULL JURISDICTION TO ENJOIN BG&E FROM DISCONTINUING SERVICE TO GRANT, TO DETERMINE WHETHER A SECURITY DEPOSIT SHOULD BE REQUIRED AND TO DETERMINE THE AMOUNT OF ANY SUCH DEPOSIT.

BG&E contends that if any authority for the exercise of jurisdiction by the Chapter XI court exists, it must be found in Section 311 of the Bankruptcy Act (BG&E Brief, pp. 13-26). That section provides:

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* Although Grant did not formally raise the issue, the District Court also observed that at the time of its decision the case was not moot, despite the likelihood at such time that Grant would shortly be ceasing its business operations, since in its view the issue involved in this case was one which "is capable of repetition yet evading review" and the injunctions against termination of services were still in effect (A 140). As will be shown in Point III, infra, since Grant and the Trustee have voluntarily requested the cessation of utility service and such service has in fact ceased, the injunctions are of no force and effect and the case is now moot. Moreover, as will be shown, this case does not present a controversy "capable of repetition yet evading review" within the meaning of the authority cited by the District Court in support of its conclusion.

> Where not inconsistent with the provisions of this chapter, the court in which the petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and his property, wherever located.

Accepting BG&E's premise, it will be demonstrated below that the parameters of Section 311 are sufficiently broad to easily accommodate the action of the Chapter XI court in enjoining the termination of utility service to Grant and in conditioning such injunction on the posting by such debtor of a reasonable security deposit in an amount determined by the Chapter XI court. Moreover, it will also be shown that with or without regard to Section 311, the issuance of an injunction against termination of utility service was well within the Chapter XI court's statutory jurisdiction to issue orders essential to preservation and protection of the debtor's assets, necessary to the continued operation of the debtor's business in the Chapter XI proceeding or necessary to effect the general purposes of Chapter XI to afford the debtor an opportunity for rehabilitation under the Bankruptcy Act.

A. Grant's Right To Receive Utility Service From BG&E Was "Property" Of The Debtor Within The Meaning Of Section 311 Of The Bankruptcy Act.

BG&E is a public utility in a monopoly position, having an obligation and duty to render gas and electric service to the public in its area. Concommitant with BG&E's duty to provide such service is the right of the public to that service. BG&E's attempt to condition its duty to continue its service to Grant upon the posting of the maximum security deposit which it was authorized to request was an attempted infringement upon Grant's right to the continuation of that service.

That the right of a debtor to continuation of utility service is a "property" right of the debtor subject to the jurisdiction of the court having charge over the proceeding for the rehabilitation of that debtor under the Bankruptcy Act has been judicially recognized. See In re Fontainebleau Hotel Corp., 508 F.2d 1056, 1058-59 (5th Cir. 1975)(continued telephone service); In re Security Investment Properties, Inc., 406 F.Supp. 628, 635 n. (N.D. Ga. 1975) ("this court agrees with the bankruptcy judge's conclusion that the right to use electrical service was property in the possession of the debtor * * * ."). Cf. Koger

v. Guarino, 44 U.S. Law Week 2529 (E.D. Pa. May 3, 1976) (right to continued water service held a "property interest" of residential water user).

Slenderella Systems of Berkeley, Inc. v. Pacific Telephone and Telegraph Co., 286 F.2d 488 (2d Cir. 1961) and In re Best Re-Manufacturing Co., 453 F.2d 848 (9th Cir.), cert. denied sub nom., Rothman v. Pacific Telephone and Telegraph Co., 406 U.S. 919 (1971) -- the cases cited by BG&E in support of its contention that the right to continued utility service was not "property" of Grant (BG&E Brief, pp. 13-19) -- are inapposite here. In the first place, those cases dealt solely with the issue of whether the debtor therein had property rights in particular telephone numbers. That issue is not present here. Of greater importance, however, is the fact that in each of those cases, involving the same telephone company, the conclusion that no property right existed in the telephone numbers in question was compelled by the terms of the contracts between the parties. Such contracts explicitly stated that "The assignment of a number to a subscriber's telephone service will be made at the discretion of the Company. The subscriber has no proprietary right in the number, and the company may make such reasonable changes in telephone number * * * designation as the requirements

of the service may demand." See Slenderella, supra, 286 F.2d at 489, n.1; Best, supra, 453 F.2d at 849-50. In the present case, BG&E has not asserted that the contract between it and Grant expressly excluded Grant from any property interest in the use of continued gas and electric service. Accordingly, the Slenderella and Best cases are not determinative of the question of whether the right to continued use of gas and electric service was "property" of Grant within the meaning of Section 311 of the Bankruptcy Act.

B. The Injunction Against Termination Of Utility Service Was Within The Chapter XI Court's Jurisdiction To Issue Orders Necessary To Preserve The Debtor's Assets And Continued Business And To Afford The Debtor An Opportunity For Rehabilitation Under Chapter XI.

Quite apart from the conclusion that the right to continued use of gas and electric service was a property right of Grant, as debtor, within the meaning of Section 311, the jurisdiction of the Chapter XI court to enjoin the discontinuance of such service can be sustained on a separate, more fundamental ground. Thus, it is well established that a bankruptcy court has jurisdiction to issue injunctions when necessary to prevent the impairment of its jurisdiction, to preserve the property of the estate, and to effect the

object of the proceedings free from interference. See, e.g., Continental Illinois Nat'l Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry., 294 U.S. 648, 683 (1935); Steelman v. All Continent Corp., 301 U.S. 278, 288-89 (1937); In re Nine North Church Street, Inc., 82 F.2d 186, 188 (2d Cir. 1936); Dealtry v. Posse School, Inc., 100 F.2d 470, 472 (1st Cir. 1938); In re International Power Securities Corp., 170 F.2d 399 (3d Cir. 1948); In re Schokbeton Indus., Inc., 449 F.2d 321, 322 (5th Cir. 1971); Converse v. Highway Constr. Co., 107 F.2d 127, 130 (6th Cir. 1939); State Finance Co. v. Morrow, 216 F.2d 676, 680 (10th Cir. 1954); In re Johnson Electrical Corp., 312 F.Supp. 840, 842-43 (S.D.N.Y. 1970) (Mansfield, J.); In re Lane Foods, Inc., 213 F.Supp. 133, 135 (S.D.N.Y. 1963) (Weinfeld, J.). As succinctly stated by Judge Weinfeld in the Lane Foods case, supra:

> The Bankruptcy Court, in Chapter XI proceedings, has the power to issue injunctions when necessary to effect the object of the proceedings free from interference. Such jurisdiction is derived from several sources -- specifically, section 2(a) (15) of the Bankruptcy Act, and generally, from section 1651 of the Judicial Code and the inherent equity powers of a court of bankruptcy.
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> 213 F.Supp. at 135 (emphasis supplied).

Thus, Section 2a(15) provides as follows:

> § 2. Creation of Courts of Bankruptcy and Their Jurisdiction. a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to --
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> (15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act: * * * .
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> (Emphasis supplied.)

And, 28 U.S.C. § 1651, the so-called "all writs" statute, provides:

> § 1651. Writs
>
> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

In the leading case of Continental Illinois Nat'l Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry., 294

U.S. 648, 683 (1935), the Supreme Court made it crystal clear that the jurisdiction of a reorganization court to issue injunctions extends both to protection of property of the debtor and to the prevention of threatened action which would interfere with the attainment of the object of the proceeding, to wit, the rehabilitation of the debtor. Thus, with respect to the protection of the debtor's property, the Court held:

> As a necessary consequence of that jurisdiction [over the debtor and its property, wherever located], the court must have the power to preserve and safeguard the property for the benefit of the trust estate * * * . Jurisdiction over the property wherever located carries with it jurisdiction to enjoin, in a proper case, interferences with the property, and this includes, by necessary inference, the power to send process that end for service upon the persons to be enjoined wherever they may be found within the United States.
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> 294 U.S. at 683 (emphasis supplied).

Similarly, in applying its powers under Section 2a(15) of the Bankruptcy Act to prevent interference with the opportunity for reorganization, the Court reasoned as follows:

> It may be that in an ordinary bankruptcy proceeding the issue of an injunction in the circumstances here presented would not be sustained. As to that it is not necessary to express an opinion. But a proceeding

> under § 77 is not an ordinary proceeding in bankruptcy. It is a special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised. And to prevent the attainment of that object is to defeat the very end the accomplishment of which was the sole aim of the section, and thereby to render its provisions futile.
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> The bankruptcy court, in granting the injunction, was well within its power, either as a virtual court of equity, or under the broad provisions of § 2 (15) of the Bankruptcy Act or of § 262 of the Judicial Code, U.S.C. title 28, § 377.
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> * * *
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> It is evident that the effect here wrought by the menace of impending sales of the collateral would seriously embarrass and probably prevent the formulation and consummation of a plan of reorganization.
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> 294 U.S. at 676, 678.

Thus, even if the right to continued utility service were not held to be "property" of Grant within the meaning of Section 311 of the Bankruptcy Act, jurisdiction of the Chapter XI court to enjoin the discontinuance of utility service can be grounded upon the power to protect the other assets of Grant and to prevent the possibility of a successful rehabilitation from being frustrated by conduct of BG&E

which would necessarily have resulted in the termination of Grant's ongoing business. It can readily be seen that had BG&E and the various other utilities demanding deposits been able to unilaterally terminate utility service to Grant's stores, Grant could not have continued its business operations, thereby substantially impairing the value of its property and assets, particularly its inventory, which would have been required to be sold at distress prices, rather than at retail. Admittedly, under Section 311 of the Bankruptcy Act, the Chapter XI court had jurisdiction over such assets. Under the authorities cited above, the Chapter XI court clearly had jurisdiction to issue an injunction to protect the value of those assets from impairment.

Moreover, the cessation of Grant's business upon the shutdown of utility services would also have frustrated the possibility of any successful rehabilitation of Grant under Chapter XI, since there would have been nothing left to rehabilitate. Again, to quote Judge Weinfeld:

> The purpose and intent of Chapter XI is to rehabilitate the debtor. The nature of the proceeding contemplates the continued operation of the business; cessation of the business would leave nothing to rehabilitate.
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> In re Lane Foods, Inc., supra, 213 F.Supp. at 135.

See also Queens Boulevard Wine & Liquor Corp. v. Blum, 503 F.2d 202, 205 (2d Cir. 1974). Cf. In re Bermec Corp., 445 F.2d 367, 369 (2d Cir. 1971); In re Yale Express System, Inc., 384 F.2d 990, 991-92 (2d Cir. 1967).

The foregoing jurisdictional principles were applied by both of the courts below in their decisions in the instant case, which decisions adopted the reasoning of Bankruptcy Judge Galgay in the Hartfield-Zodys case (A 116-118). See In re Hartfield-Zodys, Inc., supra, Exhibits "A" and "B" hereto. The same result has been reached in a number of other recent cases from bankruptcy judges and district judges in this circuit and other circuits. See In re Vogue Instrument Corp., 73 B 921 (E.D.N.Y. November 26, 1973) (Parente, B.J.)*; In re Security Investment Properties, Inc., B 74-2506A (N.D. Ga. July 9, 1975) (Norton, B.J.), aff'd, 406 F.Supp. 628 (N.D. Ga. 1975)**; In re Stenibac, Inc., 74-537-N (E.D. Va. December 19, 1974) (Bonney, B.J.)***. As summarized by Bankruptcy Judge

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* A copy of Bankruptcy Judge Parente's decision in Vogue Instrument is annexed hereto as Exhibit "C".

** A copy of the opinion of Bankruptcy Judge Norton in Security Investment Properties is annexed hereto as Exhibit "D".

*** A copy of Bankruptcy Judge Bonney's decision in Stenibac is annexed hereto as Exhibit "E".

Norton, in the Security Investment Properties case, supra, a case on all fours with the present case, except for the fact that there, no deposit whatsoever was required of the debtor:

> Even if such utility service were not held to be intangible "property" "possessed" by the debtor-in-possession or trustee and jurisdiction of the Bankruptcy Court, under Sections 311 and 312 of the Bankruptcy Act (11 USCA 711, 712), Sections 2 (a) 15 of the Bankruptcy Act and 28 USCA 1651 provide the equitable and remedial injunctive power to protect the privileges of debtors and the rights of creditors under the jurisdiction of the court as authorized and contemplated by Congress and the rehabilitation remedial provisions of the Act. Injunction is an inherent power of the Bankruptcy Court to assist in the accomplishment of the purposes of Chapter XI of the Act. The injunctive power of the Court to prevent discontinuation of the electrical service is required here to protect the other assets and rights of the debtors, to protect the rights of the other creditors and to make rehabilitation under reorganization possible.
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> To rule otherwise would conflict with the rehabilitation and continuity of the business purpose of Chapter XI, in contrast to liquidation as in straight bankruptcy. To allow a security deposit as demanded by Plaintiff would defeat the possibility of reorganization, frustrate the intent of Congress in enacting the rehabilitative chapters and be contrary to the very purposes of the Act.
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> Exhibit "D" hereto, p. 15 (emphasis supplied).

It is significant that BG&E has cited no cases holding otherwise.

BG&E's "telephone number" cases, Slenderella and Best, whatever their vitality on their particular facts, lack the decisive element present here: the termination of utility services by BG&E and the other utilities providing such services to Grant would have put an end to Grant's business, thereby forcing Grant into a bankruptcy liquidation and frustrating the purposes of the Chapter XI proceedings. Moreover, even if it be assumed, arguendo, that the Slenderella case, decided by this Court in 1961, has the scope of application claimed for it by BG&E, it is submitted that in view of this Court's recent decisions giving effect to the overriding goal of successful corporate rehabilitation embodied in Chapters X and XI of the Bankruptcy Act, this Court should not today take such a narrow view of the jurisdiction of the reorganization court. See, e.g., Queens Boulevard Wine & Liquor Corp., supra, 503 F.2d at 206-07; In re Bermec Corp., supra, 445 F.2d at 369; In re Yale Express System, Inc., supra, 384 F.2d at 991. Cf. In re Israel-British Bank, Docket 75-5020 (2d Cir. May 25, 1976) (jurisdiction upheld to "avoid an inequitable result to creditors" of the estate).

Once it is determined that the Chapter XI court had jurisdiction to enjoin the discontinuation of utility service for failure to post a security deposit in the amount demanded, it follows as a natural corollary that such court, as a court of equity, had the power to condition such injunction on the posting of a reasonable deposit consistent with the duty of such court to afford the debtor an opportunity for rehabilitation pursuant to Chapter XI. See Bankruptcy Judge Galgay's Hartfield-Zodys decision, Exhibit "A" hereto, p. 4; In re Vogue Instrument Corp., supra, Exhibit "C" hereto, p. 6. Cf. In re Fontainebleau Hotel Corp., 508 F.2d 1056, 1059 (5th Cir. 1975). Indeed, in a number of cases, the courts have concluded that the utility in question was adequately protected without any deposit whatsoever, but by a direction, present as well in the instant case, that the debtor make prompt payment of current bills and by the fact that all unpaid bills incurred in the proceeding are entitled to priority in payment as an expense of administration. See In re Penn Central Transportation Co., 467 F.2d 100, 103 (3d Cir. 1972); In re Security Investment Properties, Inc., supra; In re Stenibac, Inc., supra.

In the present case, the District Court rejected BG&E's contention that the Bankruptcy Judge

"fail[ed] to balance the equities" and concluded that the Bankruptcy Court "allowed BG&E adequate protection when Grant was required * * * to post one month's security, pay all current bills, and to pay additional security in the event of default with respect to current payments" (A 138).*

* * *

In sum, it has been shown in this Point I that the Chapter XI court had full jurisdiction -- under Sections 311 and 2a(15) of the Bankruptcy Act and under its general equitable jurisdiction -- to restrain BG&E from discontinuing service to Grant. The power to determine whether a security deposit should be required as a condition to such service and to determine the amount of any such deposit is inherent in the absolute power to enjoin the termination of service. It will now be demonstrated that the order of the Chapter XI court was not, as claimed by BG&E, in conflict with the provisions of 28 U.S.C. § 959(b).

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* It should be noted that upon this appeal BG&E has not seen fit to raise as an issue, as it did below, the alleged abuse of discretion by the Bankruptcy Judge in making its deposit order. Instead, the only issues raised by BG&E are the jurisdictional issue and its argument based on 28 U.S.C. § 959(b). See BG&E Brief, pp. 2-3.

POINT II

28 U.S.C. § 959(b) DID NOT COMPEL COMPLIANCE BY GRANT WITH THE DEMAND OF BG&E FOR THE MAXIMUM SECURITY DEPOSIT WHICH IT WAS PERMITTED TO REQUEST UNDER ITS TARIFFS AS A CONDITION TO THE RECEIPT OF CONTINUED UTILITY SERVICE.

BG&E claims that 28 U.S.C. § 959(b), which requires a debtor-in-possession to operate the property in its possession in accordance with the "valid laws of the State in which such property is situated," also requires compliance by a debtor-in-possession with any demands made by utilities pursuant to their tariffs, and that consequently, the Chapter XI court was without authority to relieve Grant of such alleged obligation. See BG&E Brief, Point II.

BG&E's Section 959(b) argument cannot withstand scrutiny. First, BG&E's pertinent tariff provisions are not "valid state laws" of the type contemplated by Section 959(b). Thus, nothing in BG&E's tariffs compels BG&E to require a two-months' security deposit of Grant. The tariffs merely authorize BG&E to do so. Consequently, as held by the District Court, the Chapter XI court "has not permitted Grant to operate its business in violation of a valid state

law within the meaning of § 959(b)" (A 134).

Moreover, such tariff provisions, and the statutes pursuant to which they are adopted, do not proscribe or enjoin conduct generally, as do the statutes found in the cases cited in BG&E's brief, such as anti-pollution, licensing, safety or other statutes seeking to regulate businesses. Indeed, the tariffs and the statutes authorizing their adoption do not even purport to regulate conduct of the debtor, as distinguished from conduct of the utility. Rather, as recognized by the District Court (A 134), such tariffs and statutes merely grant a regulated utility contractual rights against its customers. As with other contractual rights enforceable under state law, once a petition under the Bankruptcy Act has been filed, contractual rights must yield to the demands of the bankruptcy laws. "Their very purpose is to suspend the normal operation of rights and obligations between the debtor and his creditors." In re Fontainebleau Hotel Corp., 508 F.2d 1056 (5th Cir. 1975); see also In re Kassuba, 396 F.Supp. 324, 326-27 (N.D. Ill. 1975); In re Penn Central Transportation Co., 328 F.Supp. 1276 E.D. Pa. 1971), aff'd, 467 F.2d 100 (3d Cir. 1972). Thus, the reorganization aims of the Bankruptcy Act are paramount

and the private contractual rights of parties must be subordinated where the reorganization efforts require and the interests of private parties can be adequately safeguarded. Smith v. Hoboken R.R., 328 U.S. 123, 132-33 (1946); In re Queens Boulevard Wine & Liquor Corp., 503 F.2d 202, 206-07 (2d Cir. 1974); In re Bermec Corp., 445 F.2d 367, 369 (2d Cir. 1971); In re Yale Express Sys., Inc., 384 F.2d 990, 992 (2d Cir. 1967); R.F.C. v. Kaplan, 185 F.2d 791, 797 (1st Cir. 1950); In re Merritt Lumber Co., 336 F.Supp. 325, 326 (E.D. Pa. 1971).

As held in the District Court's opinion, BG&E was adequately safeguarded by the requirement that Grant post one month's security, pay all current bills promptly and pay additional security in the event of default with respect to current payments (A 138). No valid reason exists why BG&E's rights under state law to terminate service absent the requested deposit should be entitled to any greater dignity than, for example, the secured creditors' foreclosure rights under the Uniform Commercial Code in the Yale Express or Bermec cases, supra, or the landlord's rights under state landlord-tenant law in Queens Boulevard, supra. Indeed, in Queens Boulevard, by reason of the equities involved, lease termination was refused by this Court, not only in the face of valid state law giving the landlord repossession rights, but also in the face of valid federal law (§ 70b of the Bankruptcy Act) explicitly stating that such rights are enforceable.

Furthermore, assuming, arguendo, that the provisions of Maryland law upon which BG&E relies apply to the conduct of the business of a debtor-in-possession, as attempted to be applied here by BG&E they are in conflict with the purposes and objectives of the Bankruptcy Act and are therefore "invalid" by virtue of the Supremacy Clause of the United States Constitution. Thus, it is well established, especially by recent case law, that a utility has no right to require a deposit from a company in an insolvency proceeding as a condition to continued service, notwithstanding the existence of a state law or utility tariff purporting to authorize such a deposit. See, e.g., In re Fontainebleau Hotel Corp., 508 F.2d 1056, 1059 (5th Cir. 1975); In re Penn Central Transportation Co., 328 F.Supp. 1276 (E.D. Pa. 1971), aff'd, 467 F.2d 100 (3d Cir. 1972); In re Security Investment Properties, Inc., supra, Exhibit "D", aff'd, 406 F.Supp. 628 (N.D. Ga. 1975); In re Hartfield-Zodys, Inc., supra, Exhibits "A" and "B"; In re Stenibac, Inc., supra, Exhibit "E"; In re Vogue Instrument Corp., supra, Exhibit "C".

The underlying theory of the above cases is that whatever force rights created by state law may have prior to the commencement of a rehabilitation proceeding under

the Bankruptcy Act, or absent bankruptcy considerations, after a rehabilitation proceeding is commenced the state law must yield to the paramount interest of the Bankruptcy Act. Thus, in the Fontainebleau case, supra, involving a state statute requiring the posting of cash deposits for the receipt of telephone service, the Court stated:

> Before the filing of the petition, it [the telephone company] had certain rights under state law. After the filing of the petition, the demands of the bankruptcy laws take precedence. If a creditor, like the telephone company, could continue to enforce his state law rights after the initiation of bankruptcy proceedings, the bankruptcy laws would be meaningless. Their very purpose is to suspend the normal operation of rights and obligations between the debtor and his creditors.
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> 508 F.2d at 1059 (emphasis supplied).

Applying such reasoning, the Court rejected the contention of the telephone company that the existence of its tariffs, adopted pursuant to state law, precluded the issuance of an injunction enjoining the telephone company from, inter alia, requiring a $10,000 deposit from a Chapter X debtor as a pre-condition to continued service.

Similarly, in the Penn Central case, supra, the district court denied Consolidated Edison's request for a security deposit from a debtor in a Section 77 reorganization proceeding, notwithstanding New York Public Service Law § 120, which authorizes such a request. The Penn Central decision was affirmed by the Third Circuit. 467 F.2d 100 (3d Cir. 1972). In denying the deposit request, the district court observed, in remarks equally applicable to the present case:

> Con Ed has the security of a Court order directing the Trustees to make current payments. All current bills are being honored. Except for a few minor delays not attributable to the Trustees, order No. 18 [requiring prompt payment of all utility bills] has been and is being fully complied with. If Con Ed is entitled to require a security deposit, then so are all of the other 40-odd utilities which furnish substantial amounts of power to the railroad; yet requiring such deposits would likely make it financially impossible for the railroad to operate at all. The provisions of state law must yield to § 77 on this issue.
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> 328 F.Supp. at 1278 (emphasis supplied).

The conclusions reached in the Fontainebleau and Penn Central cases and the other cases cited above, are

the logical result of the application of the constitutional principles enunciated in the leading case of Perez v. Campbell, 402 U.S. 637 (1971). In Perez, the United States Supreme Court struck down an Arizona financial responsibility statute which provided that a discharge in bankruptcy did not relieve an individual from having his driver's license suspended if he failed to satisfy a judgment against him in an action arising out of the operation of a motor vehicle. The statute in question was invalidated under the Supremacy Clause of the United States Constitution (Article VI, clause 2) as being in conflict with the mandate of Section 17 of the Bankruptcy Act, which provides that the receipt of a discharge in bankruptcy fully discharges all but certain specified judgments. In so holding, the Supreme Court reiterated

> the controlling principle that any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause.
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> 402 U.S. at 652 (emphasis supplied).

The Perez rationale was recently applied by the California Public Utilities Commission in refusing to require a Chapter XI debtor to pay a pre-petition bill as a condition precedent to the continuation of its existing

telephone service. 101 Plating Corp. v. The Pacific Telephone and Telegraph Co., Case No. 9313 (Cal. Pub. Util. Comm., December 17, 1974).* In reaching such conclusion, the Commission stressed that the proposed discontinuation of service "would frustrate the overall rehabilitative policy of the Federal Bankruptcy Act as enunciated in Perez" (Exhibit "F", p. 4). It can readily be seen that if the requirement of a security deposit pursuant to state law or utility tariff adopted thereunder would frustrate the purposes of an arrangement proceeding, such requirement must be constitutionally invalid as violative of the Supremacy Clause as enunciated in the Perez case.

The cases cited by BG&E in connection with its 28 U.S.C. § 959(b) argument have no applicability here. In Chemical Lime Co. v. West Penn Power Co., 24 F.Supp. 217 (M.D. Pa. 1938) (see BG&E Brief, pp. 28-29), the court in its discretion determined that since the utility's deposit demand was in accordance with state law, it had no jurisdiction to enjoin the utility from terminating service to the debtor or to require the return of a deposit to the debtor. The court cited no authority for its assumption

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* A copy of the 101 Plating Corp. decision is annexed hereto as Exhibit "F".

that it lacked jurisdiction and, as shown herein, was simply wrong to assume that the equitable powers of the bankruptcy court under the Bankruptcy Act do not take precedence over a conflicting demand made pursuant to state law. See the full discussion of Chemical Lime in In re Security Investment Properties, Inc., supra, Exhibit "D", pp. 8-10; see also Point I, supra. And, of course, Chemical Lime no longer has any vitality even in its own circuit. See In re Penn Central Transportation Co., 467 F.2d 100 (3d Cir. 1972), affirming 328 F.Supp. 1276 (E.D. Pa. 1971).

The Gillis v. California, 293 U.S. 62 (1934), and Palmer v. Massachusetts, 308 U.S. 79 (1939), cases cited by BG&E (see BG&E Brief, pp. 30-31) are entirely inapposite. The Gillis case dealt with a general regulatory state statute requiring a surety bond for all businesses engaged in gasoline distribution. Such statute regulated conduct of the debtor for the protection of the public and is wholly different from the statute in the instant case which merely grants to BG&E, a private party, a contractual right as against its customers. See pp. 26-27, supra. The Palmer

case deals with the overlapping of the jurisdictions of the federal courts and agencies and state agencies in the context of railroad reorganizations and must be read as limited to its particular facts. See 308 U.S. at 86-87 ("the whole scheme of § 77 leaves no doubt that Congress did not mean to grant to the district courts the same scope as to bankrupt roads that they may have in dealing with other bankrupt estates"). That sufficient jurisdiction exists to support the Bankruptcy Court's orders in this case is amply demonstrated in Point I of this Memorandum.

In In re Dolly Madison Industries, Inc., 504 F.2d 499 (3d Cir. 1974) (see BG&E Brief, pp. 31-32), the state law in question was a Virginia statute which expressly forbade the conduct of the debtor's business, absent the filing with the state of certain reports, payment of applicable fees and holding of a state certificate authorizing the transaction of business in the state. Such statute bears little relation to the Maryland statute in the present case, which merely allows, but does not require BG&E to demand a deposit, and which gives BG&E only a contractual right which is subject to modification

by the Bankruptcy Act. See pp. 26-32, supra.

* * *

In sum, BG&E had no absolute right to demand a deposit from Grant as a condition to continued service, and whatever rights BG&E may have had under state law, 28 U.S.C. § 959(b) did not require that Grant either comply with BG&E's demand for a two-month's deposit or have its business effectively terminated by the cessation of gas and electric service.

POINT III

THIS APPEAL MUST BE DISMISSED AS MOOT.

It is fundamental that "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." North Carolina v. Rice, 404 U.S. 244, 246 (1971). Under Article III of the Constitution "the exercise of federal judicial power depends upon the existence of a case or controversy." Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964); see also Powell v. McCormack, 395 U.S. 486, 496 n.7 (1969); Sibron v. New York,

392 U.S. 40, 50 n.8 (1968). It is submitted that there is no case or controversy presently before this Court.

The justification for requiring a security deposit is to insure payment for services to be rendered by a utility company to its customer (A 37-39; BG&E Brief, pp. 8-10). When the utility company will no longer be called upon to supply such services, and the customer has brought payment of its bills up to date or such bills are covered by an existing security deposit, it is obvious that the posting of an additional security deposit no longer serves any purpose. At that point the issue of whether or not a tariff requiring the posting of a security deposit should be enforced is moot in the clearest sense of that word. There is simply no purpose to be served by deciding the issue. Such is the situation presently before this Court.

Grant was adjudicated a bankrupt on April 13, 1976 and has totally and permanently terminated its business operations. BG&E has permanently terminated all services to Grant and the Trustee at their request (see pp. 8-9, supra) and neither Grant nor the Trustee will incur any further charges for utility service from BG&E. All bills and charges for service rendered by BG&E to Grant during the Chapter XI proceeding

(and to the Trustee for a short time thereafter) have either been paid or are more than fully covered by the existing one-month's security deposit. Thus, BG&E no longer has any need for a two-month's security deposit to insure payment for its services and there is no judicially cognizable dispute in this case.

However, in affirming the Bankruptcy Judge, the District Court found that at that time the issue was not moot, on two separate grounds: first, "that the present issue * * * presents an issue which is capable of repetition yet evading review," citing Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974) (A-140); and, second, that there was a continuing injunction prohibiting BG&E from terminating utility services to Grant, as debtor-in-possession, except upon further order of the Bankruptcy Court, and that wilful violation of that injunction by BG&E could form the basis for a contempt proceeding, consequential damages, and punitive damages (A-140).*

The Trustee respectfully submits that the instant case falls outside the limits of the "capable of repetition, yet evading review" exception to mootness. That exception is intended to cover situations which are of necessity, or

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* Grant did not raise the mootness question below as a contention. Rather, Grant's counsel, upon oral argument, merely advised the District Court of the impending proceedings which resulted in the liquidation order of February 12, 1976 so that the District Court, if it deemed the matter moot, would not be required to decide the case on the merits. The Trustee does, of course, raise the issue of mootness on this appeal.

which have been shown by experience to be, too short-lived to allow for complete appellate review. Common examples of such cases are those involving upcoming elections that will occur before the issue has time to reach the appellate courts, see, e.g., Moore v. Ogilvie, 394 U.S. 814 (1969); see also Rosario v. Rockefeller, 410 U.S. 752, 756 n.5 (1973); Storer v. Brown, 415 U.S. 724, 737 n.8 (1974); cases involving residency requirements for voting which are satisfied before the party can obtain judicial review of their constitutionality, see, e.g., Dunn v. Blumstein, 405 U.S. 330, 333 n.2 (1972) (one year residency requirement); cases involving constitutional challenges to pretrial detention procedures where detention will likely end before appellate review could be completed, see, e.g., Gerstein v. Pugh, 420 U.S. 103 (1975); cases involving pregnancy and the right to an abortion, see, e.g., Roe v. Wade, 410 U.S. 113, 125 (1973); Doe v. Bolton, 410 U.S. 179 (1973); and cases involving short-lived strikes by labor unions, see, e.g., Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974).

For the present appeal to fall within this exception, it must be found that virtually all Chapter XI proceedings are of such short duration that they do not permit complete appellate review of disputes arising therein. This Court should take judicial notice that, at least in the

Southern and Eastern Districts of New York, Chapter XI cases commonly last for at least one year and often, for more than one year.* This particular dispute will take less than eight months from its inception to argument before this Court. Merely because this particular dispute did not reach this Court while the dispute was still alive, it hardly follows that the issue raised by BG&E will in the future evade review. See DeFunis v. Odegaard, 416 U.S. 312, 319 (1974). BG&E has simply failed to support its contention (BG&E Brief, p. 45) that it "will be repeatedly subject to orders which it believes are illegal, but which regularly expire prior to final appellate review."

Moreover, in recent cases in which the Supreme Court has applied the "capable of repetition, yet evading review" exception, that Court relied heavily upon the fact that the appellant had at least sought declaratory relief, in addition to other relief, such as an injunction. See, e.g., Super Tire Engineering Co. v. McCorkle, supra, 416 U.S. at 121-122 (1974); Gerstein v. Pugh, supra; Roe v. Wade, supra; Rosario v. Rockefeller, supra; Storer v. Brown, supra; Dunn v. Blumstein, supra; Moore v. Ogilvie, supra. In the

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* Thus, for example, the Tables of Bankruptcy Statistics for the fiscal year ended June 30, 1974, published by the Administrative Office of the United States Courts, reveal that 509 Chapter XI cases were commenced in the Southern District of New York in that fiscal year (Table F2), while only 147 Chapter XI cases in that district were concluded (21 dismissals, 4 consolidations, 75 adjudications and 47 arrangements)(Table F4B).

instant case, the vacating of the injunction or the requested two-months' deposit sought by BG&E will serve no valid purpose, and BG&E does not seek declaratory relief.

Furthermore, it would appear that this discretionary exception has been limited by the Supreme Court to cases involving governmental action. In Super Tire Engineering Co. v. McCorkle, supra, the Court, after listing cases in which it applied the "capable of repetition, yet evading review" exception stated that:

> The important ingredient in these cases was governmental action directly affecting, and continuing to affect, the behavior of citizens in our society.
>
> 416 U.S. 115, 126 (1974) (emphasis supplied).

See also 416 U.S. at 125-126. Research has thus far failed to uncover any Supreme Court cases not involving governmental action where this exception has been applied.

The fact that there technically exists a continuing injunction prohibiting BG&E from terminating utility services to Grant, as debtor-in-possession, does not bar this Court from dismissing this appeal on the grounds of mootness. For all intents and purposes such injunction

was dissolved at the time Grant, and subsequently, the Trustee, voluntarily requested BG&E to permanently terminate service. See pp. 8-9, supra. Commencing on the last effective date of termination of services pursuant to such requests (April 23, 1976), BG&E ceased to be obliged to supply utility services to Grant and consequently, was and is under no threat of contempt proceedings or damages for violation of the injunction.

Although the district court in In re Security Investment Properties, Inc., 406 F.Supp. 628 (N.D. Ga. 1975) refused to dismiss the appeal therein for mootness, it is submitted that such aspect of that case is erroneous and, in any event, is distinguishable from the instant case. The basis of such holding was that a "substantial number" of Chapter XI proceedings in the district in question were "short-lived", and thus the controversy was "capable of repetition, yet evading review." 406 F.Supp. at 631-32. In the first place, if the exception were to be applied merely because a "substantial number" and not virtually all Chapter XI proceedings were short-lived, the exception would swallow the rule. Moreover, the court in Security Investment also held that adjudication of bankruptcy was not in itself

sufficient to terminate the controversy on the grounds of mootness, since there was a possibility that the bankrupt might discover new assets before the bankruptcy proceedings had run their course and thus might continue its business operations, while the utility company would remain enjoined from terminating service and without a security deposit. 406 F.Supp. at 631. Such a possibility simply does not exist in the present case. As noted above, p. 8, supra, Grant has totally and permanently terminated its business operations.

Finally, BG&E has not shown and cannot show the existence of any "policy" on the part of the bankruptcy court which it claims will remain unreviewable (BG&E Brief, p. 45) unless this appeal is decided. Each case in which the bankruptcy court is called upon to issue an injunction or to determine the amount of a security deposit as a condition to such injunction involves a separate, independent exercise of discretion on the part of the particular bankruptcy judge involved and cannot be deemed to be a "policy" of the bankruptcy court.

From all of the foregoing, it is readily apparent that BG&E is in reality merely seeking an impermissible advisory opinion from this Court. There is no case or controversy

for this Court to decide and consequently, this appeal must be dismissed as moot.

Conclusion

This appeal must be dismissed as moot. Alternatively, the order of the District Court must be affirmed in all respects.

Respectfully submitted,

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Tel. No. (212) 371-9200

Theodore Gewertz
Marc H. Rosenbaum
Of Counsel.

June 1, 1976.

EXHIBIT "A"

Recfile

FILED

MAR 10 1975

JOHN J. GALGAY
Bankruptcy Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter	:	In Proceedings for An Arrangement
-of-	:	
		No. 74 B 1633
HARTFIELD-ZODYS, INC., et al.,	:	
Debtor.	:	

JOHN J. GALGAY - Bankruptcy Judge

On November 15, 1974, Hartfield-Zodys, Inc filed a petition under Chapter XI of the Bankruptcy Act. On the same day this court issued a temporary restraining order, which in part ordered petitioner, New York Telephone Company to continue to furnish Hartfield-Zodys, Inc. with service. This proceeding is an attempt by petitioner to have that restraining order lifted insofar as it affects the New York Telephone Company.

Since the Chapter XI petition was filed, the respondent has continued to operate its business as a debtor-in-possession. The petitioner, pursuant to discretionary powers given to it by the New York State Public Service Commission, requested on the day of filing a

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$26,000 deposit from the new debtor-in-possession. This sum represented two months average charges billed to the former debtor for the six month period which preceded the Chapter XI filing (Statement of Michael E. Kelly, pg 3 appended to the Order to Show Cause). The debtor-in-possession offered, and with approval of this court paid to the petitioner a $13,000 deposit. However, the telephone company is not satisfied with this amount, and now asks that the restraining order be lifted so that it may discontinue phone service if the debtor-in-possession does not comply with their demands for a full $26,000 deposit.

The petitioner asserts that the Bankruptcy Court lacks jurisdiction to deal properly with this matter. It asserts the jurisdiction of the court in a Chapter XI proceeding, as defined in Sec. 311 of the Chapter, (11 U.S.C. §711) is limited to "the debtor and his property, wherever located," and that no property interest exists here, thus leaving the court without jurisdiction. The telephone company believes that since petitioner has a readily available administrative appeal to the Public Service Commission, the Bankruptcy Court should not usurp the PSC's jurisdiction.

Section 2(a) of the Bankruptcy Act confers upon

Courts of Bankruptcy "such jurisdiction at law and in equity as will enable them to exercise original jurisdiction under this Act . . . " (11 U.S.C. §11). The crucial issue here is whether the Bankruptcy Court has jurisdiction which will allow it to utilize its equitable powers. As stated earlier, under Chapter XI, the Bankruptcy Court has jurisdiction over "the debtor and his property, wherever located" (11 U.S.C. §711). The purpose of Chapter XI has been described as to enable the court to "fulfill its duty to confirm the arrangement or plan and to release a debtor strong enough to go out again in the business world and survive". In Re: Lawrence Products Co., 211 F.Supp. 301 (D.C. Ala. 1962). To this end the Bankruptcy Court should not hesitate to act as a court of equity. As Judge Kalodner, writing in In Re: International Securities Case, 170 F.2d 399 (3rd Cir. 1948) asserted:

> The tendency of judicial interpretation of the [Bankruptcy] Act has been in the direction of progressive liberalization in respect of the operation of the bankruptcy power so as to meet the challenge of present day economics and business conditions. In Re: Imperial "400" National Inc., 429 F.2d 671 (3rd Cir. 1970).

The flow of money from the debtor-in-possession's bank account necessarily comes under the control of the Bankruptcy

Court attempting to administer a plan of arrangement, 11 U.S.C. §741. "With respect to all proceedings in bankruptcy in the course of administration, the Bankruptcy Court may act summarily and in that matter determine the rights of the parties affected". Volume 8, Collier on Bankruptcy, 14th Ed., §§321-324, Pg 430.

It stands to reason that where a Bankruptcy Court has determined that the continued use of telephone service is necessary for the rehabilitation of the D.I.P., the court, pursuant to its duty to oversee the flow of a D.I.P.'s funds, may determine what is a reasonable deposit. Further, the court may use its equitable powers under the Act to permanently enjoin the telephone company from discontinuing service so long as it has received a deposit and the D.I.P. pays its bills promptly. This was precisely the action taken by Bankruptcy Judge Albert Parente in a case strikingly similar to the one at hand. In re: Vogue Instrument Corp. (E.D.N.Y. - 73 B 921).

In In re: Penn Central Transportation Co., 467 F.2d 100 (3rd Cir 1972), the Third Circuit was forced to decide whether Con Edison was entitled to a security deposit from a railroad seeking reorganization under §77

of the Bankruptcy Act (11 U.S.C. §205). Despite the fact that Con Edison is also regulated by the New York State Public Service Commission, the Court of Appeals approved the District Court's refusal to allow the deposit sought by the appellant utility. Id. at 104. The District Court was struck by the possibility of the cumulative effect of its decision:

> "If Con Ed is entitled to require a security deposit, then so are all of the other 40-odd utilities which furnish substantial amounts of power to the railroad; yet requiring such deposits would likely make it financially impossible for the railroad to operate at all . . ." 467 F.2d 100, 103

The same sort of situation exists here. Certainly the debtor-in-possession can afford an additional $13,000 in deposit to New York Telephone. But the New York Telephone Company is by no means the sole utility holding the D.I.P.'s money for security purposes. This court has already approved the payment of $575,000 in security deposits. If the phone company can simply step in and demand that their security deposit be doubled, then so could every other state-regulated utility. The result of this cumulative pressure on the debtor-in-possession's operating funds could be devastating.

In the instant case the phone company is very much concerned, and rightly so, with securing payments of its monthly bills by the debtor-in-possession. So long as the phone company is assured of prompt payment it should be satisfied. In another recent case, In re: Stenibac Inc. (E.D. Va. Bankruptcy 74-537-N), Bankruptcy Judge Hal G. Bonney, Jr., held that once a debtor has become a debtor-in-possession, ". . . [the D.I.P.] is no longer an ordinary customer; in a sense the court is the customer although the debtor remains in possession. Ordinary business procedures must now be considered in that light". In that case Bankruptcy Judge Bonney held that a public utility was not entitled to any deposit, so long as the D.I.P. paid each monthly bill upon presentation. This court is not willing to go that far. Special pains should be taken to make sure the phone company does not lose money by giving service to a debtor-in-possession. To this end the court will require payment by the debtor-in-possession of current monthly telephone bills from New York Telephone within ten (10) business days of delivery to it. Should the D.I.P. fail to make the required payments when due, then the New York Telephone Co. is entitled forthwith to an additional deposit of $5,000

without further order of the court.

The application of the New York Telephone Company for an order to show cause is denied. Submit order on notice in conformity with the foregoing.

Bankruptcy Judge

DATED: New York, New York

MARCH 12, 1975

EXHIBIT "B"

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U.S. DISTRICT COURT
FILED
MAR 8 1978
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ED STATES DISTRICT COURT
HERN DISTRICT OF NEW YORK

In re

HARTFIELD-ZODYS, INC., et al.,
KARL'S SHOE STORES, LTD., et al.,

- Debtors,

Arrangement Nos.
74 B 1693-1694

NEW YORK TELEPHONE COMPANY,

Plaintiff-Appellant

#43883

- v -

HARTFIELD-ZODYS, INC.,

Defendant-Appellee

APPEARANCES:

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LAWRENCE W. PIERCE, D.J.

OPINION AND ORDER

Appellant New York Telephone Company brings this appeal from a decision of Bankruptcy Judge John J. Galgay

dated March 12, 1975 and the accompanying order of that court dated April 25, 1975. The issue on appeal is whether the bankruptcy court has jurisdiction to restrain New York Telephone from discontinuing service and to determine the amount of a deposit tariff, if any, to which the appellant is entitled. Finding no error, the Court affirms the decision below.

Hartfield-Zodys, Inc., Debtor and Defendant-Appellee herein filed a petition under Chapter XI of the Bankruptcy Act on November 15, 1974. On the same date the bankruptcy court issued a temporary restraining order which required, inter alia, that New York Telephone continue to furnish the debtor with telephone service. Hartfield-Zodys was permitted to operate its business as a debtor-in-possession, a status which it retains to this date.

On the day of the filing, New York Telephone, pursuant to a discretionary power granted to it by the New York State Public Service Commission (see P.S.C. Tariff No. 800 §1(H)) demanded a security deposit of $26,000 to secure the payment of service charges by the debtor-in-possession. Said amount was equal to two months average charges billed to the former debtor for the six months which

preceded the Chapter XI filing. Subsequently, the debtor offered and, with the approval of the bankruptcy court, paid to New York Telephone a deposit of $13,000.

Thereafter the telephone company petitioned Judge Galgay for an order dissolving the restraining order against it and allowing New York Telephone to discontinue service unless the debtor pays a $26,000 deposit. The telephone company argued that the bankruptcy court lacked jurisdiction to deal with the matter, asserting that federal jurisdiction is limited to "the debtor and his property, wherever located." (11 U.S.C. §711.) It was and remains the position of appellant that the new debtor-in-possession has no property interest in the continuation of old service; see Slenderella Systems of Berkley, Inc. v. Pacific Telephone & Telegraph Co., 286 F.2d 488 (2d Cir. 1961). Further, appellant asserts that the debtor-in-possession is a new entity and is entitled to telephone service only upon the same terms as any other customer.

Judge Galgay rejected the arguments of the phone company, relying upon that portion of the Bankruptcy Act which grants to courts of bankruptcy "such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title . . . ." (11

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U.S.C. §11(a)). The court reasoned as follows:

> "The flow of money from the debtor-in-possession's bank account necessarily comes under the control of the Bankruptcy Court attempting to administer a plan of arrangement . . . .
>
> "It stands to reason that where a Bankruptcy Court has determined that the continued use of telephone service is necessary for the rehabilitation of the [debtor-in-possession], the court, pursuant to its duty to oversee the flow of a [debtor-in-possession's] funds, may determine what is a reasonable deposit. Further, the court may use its equitable powers under the Act to permanently enjoin the telephone company from discontinuing service so long as it has received a deposit and the [debtor-in-possession] pays its bills promptly." (Opinion Below at 3-4)

In reaching his decision, Judge Galgay relied primarily upon two cases which presented similar circumstances. See In re Penn Central Transportation Co., 467 F.2d 100 (3d Cir. 1972); In re Vornado Instrument Corp., 73 B 921 (E.D.N.Y. November 23, 1973) (Parente, Bankruptcy Judge).

The judge also considered the matter of the deposit in the context of the debtor's overall rehabilitation, which had involved the payment of some $575,000 in similar security deposits. To protect the interests of the telephone company, the judge directed that if the debtor should fail to make payments within ten days of receipt of bills, then the telephone

company could demand an additional security deposit of $5,000 without further order of the court.

On appeal, the telephone company asserts that its deposit tariffs are reasonable and valid, that the New York State Public Service Commission has primary jurisdiction over such matters, that the debtor-in-possession, as a "new entity" has no property right in continued service, and that the bankruptcy court's order was improper in that the judge below should have abstained on grounds of comity.

The Court begins with the accepted proposition that the powers of the bankruptcy court are broad and that equitable principles govern the exercise of bankruptcy jurisdiction. See Bank of Marin v. England, 385 U.S. 99, 103 (1966). To aid in the exercise of this jurisdiction, the bankruptcy court may, in its discretion, employ the device of the injunction; see Feust v. Munson Steamship Lines, 299 U.S. 77, 83 (1936). These powers are employed to assist in "the fundamental purpose of reorganization proceedings to enable the debtor to continue operations as well as to protect the rights of creditors . . . ." In re Yale Express System, Inc., 384 F.2d 990, 991 (2d Cir. 1967); see Perez v. Campbell, 402 U.S. 637, 648 (1971).

The Congress, pursuant to its constitutional powers, has long exercised its right to establish uniform laws on the subject of bankruptcies; the Bankruptcy Act thus vests the bankruptcy court with the power "to issue an injunction when necessary to prevent the defeat or the impairment of its jurisdiction." Continental Bank v. Rock Island Ry., 294 U.S. 648, 675 (1935).

The Court does not dispute appellant's first two contentions, that deposit tariffs such as presented here are reasonable and valid and that, in most instances, the state regulatory agencies have primary jurisdiction over their administration. See Southwestern Tel. & Tel. Co. v. Danaher, 238 U.S. 482 (1915); Wood v. Public Utility Commission, 4 Cal. 3d 288, 481 P.2d 823, appeal dismissed, 404 U.S. 931 (1971); Marcelis v. New York Telephone Co., 27 App. Div.2d 595, 275 N.Y.S.2d 678 (3d Dept. 1966). Further, the reasonableness of practices such as tariff deposits required by a public utility is a well-established aspect of the jurisdiction of the Public Service Commission. See Jacob Carlson & Co. v. New York Telephone Co., 285 App. Div. 404, 137 N.Y.S.2d 797 (1st Dept.), aff'd, 309 N.Y. 253, 128 N.E. 2d 406 (1955).

However, appellant's argument that those cases operate to preclude the exercise of bankruptcy jurisdiction is not persuasive. As noted, the power of the bankruptcy court is broad and its jurisdiction must encompass that which is necessarily incident to the exercise of its special powers. While appellant does cite one case which held telephone tariff deposits beyond the reach of bankruptcy jurisdiction, Chemical Lime Co. v. West Penn Power Co., 24 F.Supp. 217 (M.D. Pa. 1938), the Court considers the more current decision of the Fifth Circuit to be controlling:

> "[T]he tariffs and related laws are no different from any state law granting a party a right against a debtor . . . . The telephone company has offered no cogent reason why it should be treated differently. Before the filing of the petition, it had certain rights under state law. After the filing of the petition, the demands of the bankruptcy laws take precedence. If a creditor, like the telephone company, could continue to enforce his state law rights after the initiation of bankruptcy proceedings, the bankruptcy laws would be meaningless. Their very purpose is to suspend the normal operation of rights and obligations between the debtor and his creditors." (In re Fontainebleau Hotel Corp., 508 F.2d 1056, 1059 (5th Cir. 1975))

Indeed, it is clear from other recent decisions that the federal court rather than the state agency is the appropriate forum for the determination of what security

deposits, if any, a public utility may require of a party undergoing federal bankruptcy proceedings. This is so despite the general principle that state regulatory agencies have primary jurisdiction over utilities such as the appellant. See, e.g., In re Penn Central Transportation Co., 467 F.2d 100, 103-04 (3d Cir. 1972).

Appellant's third contention, that bankruptcy jurisdiction is not present because the debtor-in-possession has no property interest in the continuation of old service, fails for two reasons. First, the decision which appellant contends controls, Skenderella Systems, supra, cannot be said to stand for such a broad proposition. In that case the Circuit Court held that a debtor-in-possession has no continuing property interest in the bankrupt's former telephone number, as distinct from an interest in telephone service; see 206 F.2d 403, 409. The distinction between a telephone number and telephone service is not a fine one. There are reasons why the telephone company might wish to prevent the vesting of a property right over a specific telephone number in any one customer. However, telephone service is a vital adjunct to any business; as the judge concluded below, the continued use of telephone service is necessary for the rehabilitation of the debtor.

"It is a basic maxim that the term 'public utility' implies a public use, carrying with it the duty to serve the public . . . . Concomitant with the utility's duty to serve is the customer's right to that service." (In re Securities Investment Protection, Inc., B74-2504 at 14 (N.D. Ga. July 9, 1975) (Bankruptcy Court))

Recent decisions in other circuits indicate that the continuation of utility services is important to the rehabilitation of debtors such as appellee herein. See In re Fontainebleau Hotel, supra, 508 F.2d 1056, 1059; In re Penn Central Transportation Co., supra, 467 F.2d 103-04.

While the Court does not accept appellant's argument that a debtor-in-possession has no continuing property interest in telephone service so as to furnish jurisdiction under 11 U.S.C. §711, it notes that the bankruptcy court also relied on its plenary grant of jurisdiction over the business of the debtor under 11 U.S.C. §11 to fulfill "its duty to confirm the arrangement or plan and to release a debtor strong enough to go again in the business world and survive." See In re Lawrence Products Co., 211 F.Supp. 301 (D. Ala. 1962).

Pursuant to this rationale, the bankruptcy judge concluded that jurisdiction was present over the flow of money

it may for any reason refuse to provide service or that

from the bank account of the debtor-in-possession, noting that appellant is by no means the sole utility holding the debtor's money for security reasons. Judge Galgay quoted language from a recent decision of the Third Circuit which this Court also considers instructive:

> "If [the appellant] is entitled to require a security deposit, then so are all of the other 40-odd utilities which furnish substantial amounts of power to the [debtor]; yet requiring such deposits would likely make it financially impossible for the [debtor] to operate at all . . . ." (In re Penn Central Transportation, supra, 467 F.2d at 103, quoting the opinion of the district court)

Accordingly, the result reached below can be upheld upon two alternate grounds. First, the Court concludes that the bankruptcy court had jurisdiction under 11 U.S.C. §711 over the property interest held by the debtor-in-possession in the continuation of telephone service. In re Securities Investment Protection, supra. Second, the Court agrees with the court below that jurisdiction is present pursuant to the Bankruptcy Act's grant of plenary jurisdiction under 11 U.S.C. §11. Under this rationale, the bankruptcy court exercised jurisdiction over the "flow of money from the debtor-in-possession's bank account." Under either rationale, the judge below acted to protect an important

property interest of the debtor pursuant to his statutory responsibilities under federal law.

In light of these considerations, the Court concludes that the order of the bankruptcy judge did not constitute an unwarranted interference with matters usually within the jurisdiction of state regulatory agencies. Nor did the bankruptcy judge act where abstention was called for.

The Court concludes that the bankruptcy court acted within the ambit of its jurisdiction and that it properly restrained the telephone company from terminating service to the debtor so long as the bills are paid. The arrangement whereby the debtor was required to deposit one month's security and whereby the debtor is required to pay its bills within ten days or face a $5,000 additional deposit tariff is fair and reasonable and serves to further the purposes of bankruptcy administration.

The decision of the bankruptcy court dated March 12, 1975 and the accompanying order dated April 25, 1975 are affirmed.

SO ORDERED.

Dated: New York, New York
February 26, 1976

LAWRENCE W. PIERCE
U. S. D. J.

EXHIBIT "C"

Vogue Instrument
2370.05

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In The Matter of VOGUE INSTRUMENT CORP., Debtor.	Bankruptcy No. 73-B-921 D E C I S I O N

BEFORE: HONORABLE C. ALBERT PARENTE,
Bankruptcy Judge

APPEARANCES: MICHAEL BERMAN, Esq.
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CLEARY, GOTTLIEB, STEEN & HAMILTON, Esqs.
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On September 7, 1973, Vogue Instrument Corporation (hereafter "D.I.P.") filed a petition for an arrangement pursuant to Chapter XI of the Bankruptcy Act.

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Subsequent thereto and on September 10, 1973, an order issued from this Court enjoining all proceedings against the D.I.P. Said order also provided that the New York Telephone Company (hereafter "N.Y.T.C.") be stayed and restrained from discontinuing services to the D.I.P. until further order of this Court. Notwithstanding the injunctive provision therein contained, the N.Y.T.C. demanded a security deposit of $16,200 as a condition for the continuance of its telephone service. The D.I.P., unable to raise the sum requested, proffered $5,000 in lieu thereof. The offer was rejected and telephone service terminated.

As a causal consequence of the foregoing the D.I.P., on the 13th day of September, 1973, moved by order to show cause directing the N.Y.T.C. to reinstate telephone service upon payment of the sum of $5,000 as a security deposit for payment of its telephone bills. The order to show cause was made returnable on September 18, 1973 and was adjourned to October 4, 1973, to permit briefing as to whether the Bankruptcy Court has jurisdiction with reference to the subject matter in dispute.

In essence, the N.Y.T.C. contends that the Bankruptcy Court lacks jurisdiction and is bereft of authority in any

guise to interfere with the N.Y.T.C.'s right to fix a security deposit for its services. It is alleged that the N.Y.T.C. acted in compliance with the statutory scheme as provided for under New York Public Service Law, Section 97, Subdivisions 1 and 2.

Constant therewith N.Y.T.C. asserts that the demand for a deposit of $16,200 representing prior average usage by the D.I.P. is a matter which falls exclusively within the jurisdiction of the New York Public Service Commission and is not subject to review in any state or federal court.

In further argument, N.Y.T.C. stresses the fact that the Bankruptcy Court being of statutory origin possesses only the jurisdiction expressly or impliedly conferred by statute. Moreover, that jurisdiction in a proceeding under Chapter XI rests upon property interests. It is contended that the subscriber herein (the D.I.P.) has no property right to telephone services, consequently there is no basis under which the Bankruptcy Court can exercise summary judgment.

The D.I.P. in countervailing view underscores the fact that telephone services constitute the lifeblood of the business indispensable to its existence, thus warranting the Court's intercession consonant with its equitable powers.

It is axiomatic that the Bankruptcy Court is a court of equity and that bankruptcy proceedings are equitable in their nature. Section 2a of the Bankruptcy Act provides as follows:

> "The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held."

Collier on Bankruptcy, 14th Edition, Volume 1, page 171, states:

> "The language of § 2a, investing courts of bankruptcy with 'jurisdiction . . . in equity', reflects a well established rule that bankruptcy proceedings are equitable in their nature; 'and within the limits prescribed by the Bankruptcy Acts and the special rules of practice prescribed by the Supreme Court are to be administered in accord with the general principles and practices of equity.' These proceedings are in 'the nature of proceedings in rem, adjudications of bankruptcy and orders of discharge being in every essential particular decrees in equity determining a status.'
> The bankruptcy court, therefore, is a court of equity. It will look through the form to the substance of any particular transaction

and may contrive new remedies where those at law are inadequate. Where the Bankruptcy Act is silent, equitable principles will govern. But the equitable powers of the court are to be exercised within the limits laid down by the Act and subject to and consistent with any specific provisions contained in it."

Apposite thereto, see Continental Illinois National Bank & Trust Co. v. Chicago Rock Island & Pacific Rv., 294 U.S. 648, 55 S.Ct. 595, 79 L.Ed. 110; Pepper v. Litton, 308 U.S. 295, 60 S.Ct. 234, 84 L.Ed. 281; Bank of Marin v. England, 385 U.S. 99, 87 S.Ct. 274, 17 L.Ed.(2d) 197.

It is well settled that the purpose and intent of a Chapter XI proceeding is the rehabilitation of the debtor. -- In re Pure Penn Petroleum Co., Inc., 188 F.2d 851; in re Ira Haupt & Co., 234 F.Supp. 167.

Premised upon the foregoing precepts, the Court took testimony from an officer of the D.I.P. relative to monthly telephone charges and explored the reasonable estimate of post petition requirements. From the evidence adduced it was established that the D.I.P. was in the process of reducing costs by discontinuing

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switchboards and other communication devices deemed superfluous to its operation. Adjunctively, a policy of strict control and limitation on all telephone calls was to be pursued. It was projected that the cumulative effect of such action would reduce the average cost of telephone service to less than $5,000 per month.

In context with the above, and the Court having carefully weighed the equities herein resolves the issue as follows:

1. The Court's jurisdiction in the proceeding at bar is implicitly embraced within the ambit of § 2a of the Bankruptcy Act.

2. This is not to say that the Court may usurp the right of the N.Y.T.C. or the statutory authority of the New York Public Service Commission with reference to the requirement of a two month deposit in comport with § 120 of the Public Service Law. However, insofar as the reasonableness of the deposit is concerned and whether the amount demanded by the N.Y.T.C. is arbitrary constitute subject matter patently falling within the aegis of the Bankruptcy Court.

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3. It is inconceivable either in law or equity that the N.Y.T.C., or any public utility, be armed with peremptory power of such magnitude and scope sufficient to vitiate the rights of the D.I.P. and creditors, and to bar judicial inquiry. The adoption of such an absolute premise would, in effect, emasculate an arrangement proceeding contravening the fundamental aim of the Bankruptcy Act in a Chapter XI proceeding.

4. To sustain the posture of the N.Y.T.C. would render rehabilitation of the D.I.P. herein tenuous if not impossible Supplementary thereto the Court's statutory function would be desiccated to the point of impotency.

5. The N.Y.T.C.'s contemptuous disregard of this Court's restraining order manifests conduct which the Court will not sanction. The N.Y.T.C. is not sacrosanct and it must obey an order of this Court as any other litigant until set aside. If the N.Y.T.C. was aggrieved by the restraining order of this Court it should have sought its redress through the procedural course charted under the provisions of the Bankruptcy Act. The Court hereby censures and admonishes the N.Y.T.C. and warns that it cannot ipse dixit ignore a lawful mandate of this Court.

Accordingly, the motion of the D.I.P. is granted to the extent following:

The N.Y.T.C. is permanently restrained from terminating telephone service to the D.I.P. subject to the conditions following:

A) That the D.I.P. deposit the sum of $10,000.00 as a security deposit with the N.Y.T.C.

B) That the D.I.P. pay all telephone bills promptly upon their receipt.

SETTLE ORDER.

C. ALBERT PARENTE
Bankruptcy Judge

Dated: November 26, 1973
Jamaica, N.Y.

EXHIBIT "D"

FILED IN CLERK'S OFFICE

JUL 30 1975

BEN H. CARTER, Clerk
By: Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	:	
SECURITY INVESTMENT PROPERTIES, INC.	:	CASE NO. B74-2506A
GUARDIAN PROPERTIES-ATHENS, INC.	:	CASE NO. B74-2507A
AKERS MILL, INC.	:	CASE NO. B74-2508A
NEW PACES FERRY ROAD DEVELOPMENT CO., INC.,	:	CASE NO. B74-2059A
Debtors.	:	
GEORGIA POWER COMPANY	:	
vs.	:	IN BANKRUPTCY
SECURITY INVESTMENT PROPERTIES, INC.	:	
and	:	IN PROCEEDINGS FOR AN ARRANGEMENT UNDER CHAPTER XI
GUARDIAN PROPERTIES-ATHENS, INC.	:	

OPINION

This action involves a challenge of the jurisdiction of a Bankruptcy Court to enjoin a public utility from requiring a debtor in an Arrangement Proceeding under Chapter XI of the Bankruptcy Act to post a security deposit as a condition to the continuation of the utility's service to the debtor.

FINDINGS OF FACT

Because of adverse economic conditions, defendants' various apartment projects developed severe financial problems. As a result, defendants found it necessary to institute proceedings for an Arrangement under Chapter XI on September 30, 1974.

Subsequently, plaintiff, Georgia Power Company, demanded that defendants post security deposits equal to

two months' electrical service charges totaling approximately $35,000.00 as a condition for continued service to their apartment complexes. Defendants were financially unable to comply with the plaintiff's request, but did agree that plaintiff be paid currently for all services furnished. In addition, defendants' attorneys advised plaintiff that it had a right to be paid as an administrative priority under defendants' Chapter XI proceedings and that defendants would consent to the entry of an appropriate Order to this effect. Plaintiff sought no such Order. This Court issued an Order temporarily restraining and enjoining plaintiff from terminating electrical service pending the Court's determination of whether defendants can or should be required to post security deposits as demanded by plaintiff.

Defendants are financially distressed debtors who are unable to pay their debts as they mature. Defendants filed Chapter XI Petitions herein seeking protection of the Bankruptcy Court in an effort to rehabilitate their businesses. Prior to, and at the time of filing, plaintiff was furnishing and has continued to furnish electrical power to defendants. The availability of electrical power is essential to the preservation and protection of defendants' assets and to their continued business operations. As a direct result of defendants' invoking protection under the Bankruptcy Act pursuant to Chapter XI, plaintiff has demanded a two (2) months' security deposit for each of defendants' apartment projects totalling approximately $35,000.00. Due to their financial condition, defendants were unable to pay the deposits demanded.

ISSUES

Defendants contend, however, that even if they had sufficient funds, plaintiff is not entitled to require such deposits.

Plaintiff asserts it is not seeking a ruling that

it may for any reason refuse to provide service or that it may refuse to continue electrical service to a Chapter XI debtor unless the debtor pays all indebtedness incurred prior to the date the Chapter XI proceedings were instituted. Rather, all plaintiff Georgia Power Company is seeking is the right to precondition delivery of continued electric power on the payment by the debtor of a two-month security deposit.

Essentially Georgia Power Company asserts that it has the right to impose the requirement of a security deposit upon a Chapter XI debtor just as it has the right to impose the requirement on any other commercial or industrial user of electric power. Georgia Power Company argues that it is not singling out for onerous treatment debtor corporations who are attempting to rehabilitate themselves. Except in the cases where a user who is applying for service demonstrates a very good credit rating, Plaintiff will not allow a waiver of the two-month security deposit.

Georgia Power Company recognizes that insofar as it renders service to a Chapter XI debtor after the date of the filing of the debtor's petition, it will be protected to the extent that payments to it will be treated as "administrative" expenses, but avers that such protection is insufficient.

Plaintiff contends that the Bankruptcy Court does not have authority to require it to render utility service

The sole and dispositive question presented by Georgia Power Company in this matter is whether a Bankruptcy Court in a Chapter XI proceeding has jurisdiction to restrain a utility from requiring a security deposit from a Chapter XI trustee as a condition precedent to the provision of electric service to such trustee where such action by the utility company is authorized by appropriate

state regulations.

CONCLUSIONS OF LAW

I. Under the Broad Equitable Powers Conferred Upon the Bankruptcy Court in an Arrangement Under Chapter XI of the Bankruptcy Act, the Bankruptcy Court has Jurisdictional Authority to Enjoin a Public Utility from Exacting a Security Deposit from the Debtor

Defendants herein, by instituting Arrangement Proceedings under Chapter XI of the Bankruptcy Act, are seeking the aid of this Court in formulating a plan by which they can continue to operate their businesses in a practical and financially viable manner.

In essence, Plaintiff contends the Bankruptcy Court lacks jurisdiction to restrain a public utility from requiring a Chapter XI debtor to post a security deposit requiring a Chapter XI debtor to post a security deposit in an amount and upon terms as, in its own self interest, the utility determines, without regard to the consequences. In advancing such position, Plaintiff misconstrues the applicable law and overlooks the underlying intent and purpose of Chapter XI of the Bankruptcy Act.

Under Section 2a(15) of the Bankruptcy Act, the Courts of Bankruptcy are invested with such jurisdiction at law and in equity as will enable them to

> "(m)ake such orders, issue such process, and enter such judgments, in addition, to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act."

In addition, Section 1651 of Title 28 of the United States Code (28 U.S.C. Section 1651 (1948)), provides that

> ". . . all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law."

Moreover, jurisdiction to grant injunctions is derived

from the general powers of a Court of Bankruptcy. It is well recognized that a Bankruptcy Court is a court of equity, and it is guided by equitable doctrines and principles except insofar as they are inconsistent with the Bankruptcy Act. See, e.g., SEC v. United States Realty & Improvement Co., 310 U. S. 434 (1940).

Numerous courts have decided and it seems beyond quibble that Bankruptcy Courts have jurisdiction to issue injunctions to effect the object of the bankruptcy proceeding free from interference. For example, in the case of In re Lane Foods, Inc., 213 F. Supp. 133 (S.D.N.Y. 1963), the District Court held that a Bankruptcy Court had jurisdiction to stay a warrant of execution which had been obtained by a landlord but which had not been executed. The Court said as follows:

> "The Bankruptcy Court, in Chapter XI proceedings, has the power to issue injunctions when necessary to effect the object of the proceedings free from interference. Such jurisdiction is derived from several sources--specifically, section 2 (a) (15) of the Bankruptcy Act, and generally, from section 1651 of the Judicial Code and the inherent equity powers of a court of bankruptcy. The purpose and intent of Chapter XI is to rehabilitate the debtor. The nature of the proceeding contemplates the continued operation of the business; cessation of the business would leave nothing to rehabilitation." 213 F. Supp. at 135.

The court in Lane Foods went on to say that if, upon filing a Chapter XI arrangement proceeding, a debtor who is in possession of the premises where the business is being conducted can be summarily ousted by the landlord, the very purpose of the arrangement proceeding would be frustrated.

In re Merrit Lumber Co., 336 F. Supp. 325 (E.D. Pa. 1971), is another instance in which it was determined that a Bankruptcy Court had jurisdiction to enjoin an act of a party which, if allowed, would have prevented debtor's rehabilitation. In that case, the debtor, a retail lumber and millwork company, had filed a Petition for an Arrangement under Chapter XI. Plaintiff insurance company was

the insurer of debtor's inventory and buildings from fire and other perils. In full accord with the cancellation provision in the insurance policy (which provision was valid under Pennsylvania law), the insurer sent written notices to debtor advising it of the cancellation of the policy. Upon receiving the notice of cancellation, the receivers filed a petition to compel insurer to continue insurance coverage on debtor's real and peronal property. A restraining order was issued and the insurer appealed. The District Court, in affirming the order of the Bankruptcy Court, noted that the pivotal question involved was whether, in the course of a Chapter XI proceeding, the Bankruptcy Court has the jurisdiction to enjoin an insurance carrier from cancelling an insurance policy issued to the insured prior to the proceedings. The Court said that Section 2a(15) was applicable to Chapter XI proceedings, and thus injunctions may be issued to prevent the defeat or impairment of the jurisdiction of the Bankruptcy Court, to enforce the provisions of the Act, and to effect the object of the proceedings free from interference (quoting 8 Collier on Bankruptcy Par. 3.23 (14th ed. 1969)). The court reasoned as follows:

> "The very purpose of a reorganization proceeding, as contrasted to a straight bankruptcy, is the preservation of the going-concern value of the business of the debtor . . . . (citations omitted). The testimony produced at the hearing before the Referee was that if insurance was not available, the receivers would not be able to obtain merchandise from creditors and they would not be able to continue the operation of the business." 336 F. Supp. at 327.

In the case of In re Schokbeton Industries, 449 F.2d 321 (5th Cir. 1971), the Fifth Circuit Court of Appeals held that the Bankruptcy Court is vested with discretionary power to prohibit a licensor from terminating a franchise license agreement with a debtor licensee which was still

executory at the time a Petition for Arrangement was filed. The court explained.

> "The salutory purposes of Chapter XI proceedings would be defeated if the rule were otherwise . . . . There is no question but that the Referee[1] in Bankruptcy has discretion to issue injunctions in certain circumstances . . . . The Findings of Fact made by the Referee are clear that the debtor would be irreparably harmed if the injunction were not granted. Injunctions may be issued, when necessary, to prevent the defeat or impairment of the jurisdiction of the bankruptcy court, to enforce the provisions of the Act, and to effect the object of the proceedings free from interference. 8 Collier, Par. 3.22 at 276." 449 F.2d at 322.

It is clear from the above authorities and other authorities hereinafter discussed that this Bankruptcy Court has jurisdiction to enjoin plaintiff under the circumstances of this case. Were the defendant Chapter XI debtors required to post security deposits for their several apartment complexes as demanded by plaintiff, the immediate cash outlay would amount to approximately $35,000.00. As a consequence, debtors would be unable to continue their business operations, and debtors' attempts to formulate a plan of rehabilitation would be frustrated.

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[1] now Bankruptcy Judge; Bankruptcy Rule 901(7) and 902(4)

II. The Judicial Decisions Cited by Plaintiff Do Not Support Plaintiff's Theory and Are Not Dispositive of the Issue Before This Court

In its Brief filed with this Court, plaintiff cites three cases upon which it bases its contention that a Bankruptcy Court has no jurisdiction to enjoin a public utility from requiring a security deposit from a debtor in a Chapter XI arrangement proceeding. These cases are inapposite to and are not dispositive of the issue before this Court.

The District Court in Chemical Lime Co. v. West Penn Power Co., 24 F. Supp. 217 (M.D. Pa. 1938), based its decision to refuse jurisdiction upon the particular language of the Pennsylvania statutes and a regulation of the Pennsylvania Public Utility Commission pursuant thereto. The court quoted a provision of the Pennsylvania statute which states that "(n)o public utility shall require the payment of rates in advance, . . . or deposits to secure future payments of rates, except as the commission, by regulation or order, may permit . . . ." By virtue of this statutory grant of authority, the Pennsylvania Public Utility Commission adopted a regulation which provided that deposits might be required within certain limits. The court's opinion did not describe what those limits were, but merely decided that the power company was acting within those limits when it demanded that it retain the funds that the debtor had already deposited with the power company as a condition to the continued supply of electricity to the debtor. The court recognized that the debtor and the financial resources of the debtor being demanded as a security deposit were under the supervision and control of the court. The court in its discretion determined, however, that since the power company's demands were in accordance with the laws of the State of Pennsylvania, it had no jurisdiction to enjoin the power company from

shutting off the supply of electric power to the debtor nor to require it to return the deposit to the debtor. The court cited no provisions of the Bankruptcy Act upon which to base its decision that it lacked jurisdiction to enjoin the power company.

The Chemical Lime decision is limited to the particular facts of the case and, if followed by Courts of Bankruptcy in every case, would establish a dangerous precedent. First, the court in Chemical Lime was, at best, merely exercising its discretionary power in refusing to interfere with monies already deposited with the creditor power company. It is apparent that the Pennsylvania District Court simply looked to the facts of the case and determined that the $3,000.00 already deposited with the power company was not so inequitable as to interfere with the debtor's rehabilitation under the reorganization provisions of the Bankruptcy Act. There is nothing in the court's opinion to indicate that, had the debtor not already deposited the monies with the utility and had the debtor been unable to make the deposit, the court would not have decided differently.

Secondly, the court in Chemical Lime was simply wrong to assume that the equitable powers of the Bankruptcy Court under the Bankruptcy Act did not take precedence over a conflicting state statutory provision or regulation. It is a basic legal tenet that a state law or regulation must give way to federal law whenever the latter is applicable in a given situation. When the United States Congress enacted the Bankruptcy Act, it clearly intended that there be a uniform law affecting the rights of debtors, thereby superseding any state law in conflict therewith. The United States Constitution (U.S. Const. art. 1, Par. 8, subpar. 4) empowers Congress "to establish . . . uniform laws on the subject of Bankruptcies." This constitutional provision was necessarily a grant of power the exercise of which would

impair the obligation of contracts. As was said in the case of In re Prima Co., 88 F.2d 785 (7th Cir. 1937):

> "All parties to a contract are, of necessity, aware of the existence of, and subject to, the power of Congress to legislate on the subject of bankruptcies. They were and are chargeable with knowledge that their rights and remedies, in case the debtor becomes insolvent and is adjudicated a bankrupt, are affected by existing bankruptcy laws and all future lawful bankruptcy legislation which might be enacted." 88 F.2d at 788.

It is thus clear that any provision enacted by the State of Georgia or regulation promulgated pursuant thereto pertaining to the contractual relationship between the utility and the debtor must give way when it conflicts with the federal Bankruptcy Act. It is apparent that the court in Chemical Lime overlooked this constitutional and congressional design. Such holding would vest in a utility company the power to determine the life or death of a debtor which has invoked the court's protection for the purposes of formulating a plan of rehabilitation.

The Congress in its wisdom has determined that the Bankruptcy Courts shall have the authority to protect the interests of debtors and creditors during the period in which a Plan for the rehabilitation is devised. The Court of Bankruptcy has jurisdiction during this time to deal with a debtor and its creditors in a just and equitable manner consistent with the congressional mandate. To allow the utility company extrajudicially to exact funds from the debtor so as to satisfy its own self-interest, in contrast to the treatment accorded other creditors of debtor, would be tantamount to giving the utility the ability to supersede the legal and equitable powers of the Bankruptcy Court. This clearly was not the intent and purpose of Congress.

Plaintiff also relies on two cases in which the debtors claimed property and contractual rights in their

telephone numbers. In both Slenderella Systems of Berkeley v. Pacific Tel. & Tel. Co., 286 F.2d 488 (2d Cir. 1961), and Rothman v. Pacific Tel. & Tel., 453 F.2d 848 (9th Cir.), cert. den. 406 U.S. 919 (1971), the courts concluded that the old telephone numbers did not constitute "property" within section 311 of the Bankruptcy Act, and that Chapter XI debtors were not in possession of the telephone numbers on the date of the filing of the petitions so as to authorize the courts to assume summary jurisdiction over the controversies in order to protect debtors' possession.

As hereinaforesaid in Part I hereof, such decisions misconstrue the purpose and intent of the Chapter XI provisions to continue the business without interruption. Rehabilitation of the debtor for the long-range benefit of the unsecured creditors of all classes and for the benefit of the employees and stockholders as a viable operating economic entity is the key concern of the Act, albeit some temporary burden or detriment to some creditors. And said decisions misconstrued the power and authority of the Bankruptcy Court to enjoin the unilateral actions of a creditor which would impede and frustrate the attempts of the debtor and the court to accomplish rehabilitation reorganization as contemplated by the Act. Those courts also undervalued the necessity of business entities to continue, without interruption, telephone service including the prior number and listing. Clearly such continued service in a business operation under the direction and supervision of the Bankruptcy Court is an intangible property right as contemplated by the Act and is a valuable asset which the injunctive power of the Bankruptcy Court should protect.

Quite recently, such decisions have been clearly rejected by the Fifth Circuit Court of Appeals[2] and are,

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2. In re Fontainbleau Hotel Corporation v. South Central Bell Telephone Company, 508 F.2d 1056 (5th Cir. 1975), 3 CBC 379.

therefore, contrary to the rule in this jurisdiction. Said decision held that telephone numbers of corporation undergoing reorganization under the Bankruptcy Act were "property" over which the Bankruptcy Court had summary jurisdiction and that its authority to issue protective orders against interference with that property follows naturally. The Court stated:

> "It is often said that the touchstone of the bankruptcy court's jurisdiction is possession, either actual or constructive, of the property involved in the controversy. . . . Thus, if the receiver or the trustee has physical possession of the property involved in the controversy, the power of the Bankruptcy Court to deal with this property in a summary fashion is clearly established. Collier, supra, at Section 2.008."
>
> "The question thus is, did the hotel have 'possession' of the telephone numbers in question at the time the petition was filed? Right of use is surely the most important attribute of possession, and the hotel clearly had the right of use as to these telephone numbers at the time the petition in bankruptcy was filed." (P. 3963.)

The court stated:

> "a tariff . . . drafted by the company and certain to be self-serving, cannot determine the meaning of the term "property" in the federal bankruptcy statute. . . . The purpose of summary jurisdiction is to give the Bankruptcy Court a quick means of preserving the wherewithal for maintaining the debtor's business. Protecting use of the telephone numbers by the debtor clearly falls within that responsibility." P. 3964. . . . "the telephone company's tariffs do not stand in the way of the injunction issued by the Bankruptcy Court. The tariffs and the relevant portions of state law, do not compel the company to issue new numbers when service is transferred from one subscriber to another (here, from the hotel to the trustees), or to demand a deposit." (emphasis supplied)
>
> "If a debtor becomes delinquent on a loan payment, for example, the creditor is entitled, under state law, to recover a judgment on the debt. If the creditor has not done so by the time a bankruptcy petition is filed by the debtor, however, his state law right is subordinated to the federal bankruptcy laws (assuming of course that the creditor does not

hold a security interest in any of the debtor's property). The telephone company has offered no cogent reason why it should be treated differently. Before the filing of the petition, it had certain rights under state law. After the filing of the petition, the demands of the bankruptcy laws take precedence. If a creditor, like the telephone company, could continue to enforce his state law rights after the initation of bankruptcy proceedings, the bankruptcy laws would be meaningless. Their very purpose is to suspend the normal operation of rights and obligations between the debtor and his creditors. (Emphasis supplied).

"The Third Circuit has expressed a similar view in a case very much like the present one. A utility company was owed $1,200,000 by the bankrupt Penn Central Transportation Company. The court observed:

> "Con Ed has the security of a Court order directing the Trustees to make current payments. All the current bills are being honored. . . . If Con Ed is entitled to require a security deposit, then so are all of the other 40-odd utilities which furnish substantial amounts of power to the railroad; yet requiring such deposits would likely make it financially impossible for the railroad to operate at all. The provisions of state law must yield to Section 77 (the preecessor of Chapter Ten, for railroads) on this issue. In re Penn Central Transportation Co., 3 Cir., 1972, 467 F.2d 100, 103." (emphasis supplied)

Finally, the Fifth Circuit Court held that the requirement of FRCP 65 (c) that a party seeking an injunction may be required to post a bond or security in order to assure indemnification of any party wrongfully wronged is inconsistent with the purposes of the Bankruptcy Act and does not apply to summary bankruptcy proceedings. The Court stated:

> "We believe these courts have correctly chosen not to compromise the Bankruptcy Court's ability to act in aid of its own jurisdiction."

The Court approved the determination by the Bankruptcy Court that "releasing $10,000 in operating capitol or . . . were unacceptable alternatives from which to choose."

Although similar to telephone service, the debtor in this case is claiming the more fundamental right to a

service which the Georgia Power Company has an obligation and a duty to render. It is a basic maxim that the term "public utility" implies a public use, carrying with it the duty to serve the public and to treat all persons alike, and it precludes the idea of service which is private in its nature and is not to be obtained by the public. See 73 C.J.S., Public Utilities Section 1 (1951), and cases cited therein. Concomitant with the utility's duty to serve is the customer's right to that service. Georgia Power Company's attempt to condition its duty to continue its service upon the debtor's posting of a security deposit is an infringement upon the debtor's fundamental right to the continuation of that service.

The filing of the Chapter XI petition does not terminate or create a hiatus in the utility service to a business enterprise. As with all property of the debtor upon the filing, the debtor in possession or receiver succeeds to all of the property and rights of the debtor, including utility service necessary to continue the business. The utility, though an "unsecured" creditor for prior utility services rendered to the debtor which debt will be dealt with in the Plan of Arrangement, is a "preferred" creditor as to services to the debtor in possession (i.e. the trustee) since utility services following the filing of the petition are administrative expenses, in recognition of the essential nature of the services to the potential rehabilitation process of the debtor, and have a priority of payment over other current expenses and prior debts. The requirement of a security deposit by a utility is foreign and hostile to the purpose of the Chapter XI proceeding.

As argued by Plaintiff, the decision in Fontainebleau may not be distinguished from the facts sub jure. The reasoning in Fontainebleau as to the purpose of the Bankruptcy Act apply here to the same degree. Although the value of

the continuation of existing telephone numbers was discussed and emphasized in the Opinion, the Fontainebleau decision did not turn on the mere finding that the telephone numbers were property; the uninterrupted telephone service through the existing numbers was the "property." Electrical power service is no less "property" than telephone service. The right of the debtors to continue to receive electrical service is a right of property. Without the continued service, the business cannot continue. All property and assets of the debtors would become useless without the uninterrupted electrical power.

Even if such utility service were not held to be intangible "property" "possessed" by the debtor-in-possession or trustee and jurisdiction of the Bankruptcy Court, under Sections 311 and 312 of the Bankruptcy Act (11 USCA 711, 712), Sections 2 (a) 15 of the Bankruptcy Act and 28 USCA 1651 provide the equitable and remedial injunctive power to protect the privileges of debtors and the rights of creditors under the jurisdiction of the court as authorized and contemplated by Congress and the rehabilitation remedial provisions of the Act. Injunction is an inherent power of the Bankruptcy Court to assist in the accomplishment of the purposes of Chapter XI of the Act. The injunctive power of the Court to prevent discontinuation of the electrical service is required here to protect the other assets and rights of the debtors, to protect the rights of the other creditors and to make rehabilitation under reorganization possible.

To rule otherwise would conflict with the rehabilitation and continuity of the business purpose of Chapter XI, in contrast to liquidation as in straight bankruptcy. To allow a security deposit as demanded by Plaintiff would defeat the possibility of reorganization, frustrate the intent of Congress in enacting the rehabilitative chapters

and be contrary to the very purpose of the Act.

The ruling herein made in Part I hereof is congruent with the decision of Bankruptcy Judge Bonney, E.D. Va., in In re Steniback, Inc., Bankruptcy No. 74-537-N, dated December 19, 1974. (Bankruptcy Court Decisions, 330)[3]. There Judge Bonney held that the gas and electric utility company cannot terminate service of Chapter XI debtor and require security deposit; and that the rules of the state utility commission approving the tariffs of the utility must yield to the intent of Congress to promote business rehabilitation under Chapter XI since the Bankruptcy Act is supreme.

In applying the standard enunciated by the Fifth Circuit Court at Page 3966 in the Fontainebleau case in considering a preliminary injunction, this Court herein has balanced "the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction", and has determined that releasing the approximately $35,000 in operating funds for the deposit required to continue electrical service would adversely cripple the continuation of debtors' business and possibly defeat the Chapter XI proceedings. And, on the other hand, the withholding of said deposit from Plaintiff is not likely to adversely affect it since the utility has exceptional protection in that its charges are costs of administration of this Chapter XI case and this Court's order will require payment of current utility charges for electrical service to debtors on the penalty of dismissal in the event of non-payment.

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3. In re Stenibac, Inc., Bankruptcy Court Decisions, 330, Corporate Reorganization Reporter, INc. Washington, D.C.

III. The Bankruptcy Commission's Proposed Section 7-105 of the Bankruptcy Act Does Not Alter the Bankruptcy Court's Existing Power to Frame an Order Which Will Give to Public Utilities Adequate Assurance of Payment for Services

Plaintiff points out that Section 7-105 of the proposed new Bankruptcy Act, as proposed by the Bankruptcy Commission, now pending in Congress, will protect both the debtor and the utility with respect to the furnishing of future service and the payment therefor. It is Plaintiff's contention that the omission of a similar Section from the present bankruptcy laws implies that at present a Bankruptcy Court has no power to enjoin a public utility which asserts that it will provide future service only upon payment of a security deposit.

Plaintiff's interpretation of the proposed provision and of the Bankruptcy Commission's note thereto is an inaccurate and illogical construction of the existing bankruptcy laws. First, a Bankruptcy Court presently possesses unmistakable power to mold an order which will provide a utility priority in payment. Secondly, as mentioned previously, plaintiff's claim for services rendered to debtors during the pendency of this case will be accorded automatic priority by this Bankruptcy Court. By virtue of the Court's authority in this regard, it may protect the debtors' right to continued service as well as the utility's right to assurances for payment therefor. Thus plaintiff is inaccurate in stating that the new provision would add to the Bankruptcy Court's jurisdiction a power that it does not already possess.

Therefore, Plaintiff's assertion that present bankruptcy provisions do not give a Court of Bankruptcy jurisdiction in this case is unfounded. One can only surmise how the Courts will interpret and apply the proposed Section 7-105 if and when the Section is enacted into law. Never-

theless, it is clear that the existing Bankruptcy Act empowers the Court of Bankruptcy to issue such orders as will protect the interests of the debtor and all creditors without discrimination and in the interests of justice.

Furthermore, Section 7-105 of the proposed new Bankruptcy Act was devised by the Bankruptcy Commission and presented to the House of Representatives for its consideration on October 9, 1973. H.R. Rep. No. 10792, 93rd Cong., 1st Sess. 195 (1973). On September 12, 1974, a proposed new Bankruptcy Act that was devised by the National Conference of Bankruptcy Judges was presented to the House for its consideration. H.R. Rep. No. 16643, 93rd Cong., 2nd Sess. (1974). The provisions of the Act suggested by the Bankruptcy Judges were similar to the Commission's proposals, but Section 7-105 was deleted. In fact, the bill proposed by the Bankruptcy Judges omits any reference to discontinuance of utility services and payment of assurances by debtors filing a petition under Chapter XI.

For this Court to rely upon either the Commission's or the Bankruptcy Judges' proposals prior to final passage of the new Act would be premature. The language in the existing Bankruptcy Act is a sufficient basis upon which this Court may determine the rights of the parties in this case.

CONCLUSION AND ORDER

This Bankruptcy Court has jurisdiction in this Chapter XI case to enjoin the imposition of penalties in the nature of security deposits by a public utility company. This Court has the authority to determine whether a utility may exact a security deposit on a case by case basis. The relief sought by plaintiff in its Complaint is denied.

The plaintiff may not terminate service without prior approval of this Court, but each debtor herein shall pay its monthly charges promptly upon presentation and upon first failure of any debtor to pay promptly shall subject this Chapter XI proceeding to termination and dismissal by this Court.

This 9th day of July 1975.

William L. Norton, Jr.
United States Bankruptcy Judge

EXHIBIT "E"

governed the terms of his credit card account. The notice was not sent certified mail with a return recepit requested. There was testimony that another notice was customarily sent by the Bank to card holders when a card holder exceeded his line of credit, but there was no proof of receipt of such notice; and no positive proof that such a notice was in fact mailed.

After reaching the above findings of fact and conclusions of law, and having found that the Bankrupt, Jeffrey Elton Bowman, should not be discharged from the above indebtedness for the reasons stated above, it is

ORDERED AND ADJUDGED that discharge of the said Bankrupt as to the Trust Company of Georgia Bank of Savannah, N.A., in the amount of $1,402.79, be, and hereby is, denied under Sections 17(a)(2) and (8) of the Bankruptcy Act; and it is

ORDERED AND ADJUDGED that Trust Company of Georgia Bank of Savannah, N.A. have judgment against said Bankrupt in the sum [6]of $1,402.79, plus interest at the lawful rate, in accordance with provisions of Sections 17(c) of the Bankruptcy Act.

In re STENIBAC, INC.
Debtor
Bankruptcy No. 74-537-N

E.D. Va.
December 19, 1974

Where utility company providing gas and electric service to Chapter XI debtor filed application to require a cash security deposit from the debtor in the amount of two months' charges, arguing that under Terms and Conditions on file with State Corporation Commission it could in its sole judgment require such deposit, *HELD*, utility has exceptional protection in that its charges are cost of administration. Should conflict exist between S.C.C.'s authorization to require security deposit and intent of Congress to promote rehabilitation under Chapter XI, Bankruptcy Act is supreme. Utility may not terminate service but debtor shall pay its monthly charges immediately upon presentation and upon first failure of debtor to do so shall tender cash security deposit of $1,000.00. Application dismissed. Sec. 311, 314.

HAL J. BONNEY, JR., Bankruptcy Judge

MEMORANDUM OPINION

Stenibac, Inc., and Tomlin Lumber Company, Inc., each filed a petition under Chapter XI of the Bankruptcy Act and subsequently the cases were consolidated. The first meeting of creditors was adjourned to January 8, 1975, for the consideration at that time of acceptance of the plan by the creditors.

The Virginia Electric and Power Company [Vepco] filed an application for authority to require a cash security deposit from the debtor in the amount of two months' charges for gas and electric service. At the hearing thereon Vepco argued that by the nature of its business "it cannot sell its services on a cash on delivery basis." It further argued that pursuant to Paragraph IX of its Terms and Conditions on file with the regulatory agency, State Corporation Commission [S.C.C.], Commonwealth of Virginia, that in its discretion, within its judgment solely, such a deposit can be required.

The debtor opposed the application viewing such a deposit as a hardship imposed at a most inopportune time. The debtor's evidence revealed that since the filing of the Chapter XI petition on July 15, 1974, the monthly charges of Vepco have all been timely paid.

Melvin H. Davie, District Credit Manager for Vepco, testified that his company instituted this action for a deposit for fear of loss at a time when it, too, is hard pressed with increasing costs of energy and a notable increase in bankruptcies. I feel this concern on the part of Vepco is a very [2]valid one. It is simply good business to seek to reduce losses by requiring a deposit of those firms and individuals whose ability to pay may be in doubt. These efforts to minimize losses are not improper for ultimately losses of this nature are passed on, through higher rates, to those who pay their gas and electric bills.

All of this notwithstanding, Stenibac is no longer an ordinary customer; in a sense the Court is the customer although the debtor remains in possession. Ordinary business procedures must now be considered in that light.

The intent of the Congress in enacting the pertinent legislation is clear and it rises higher than Vepco's authority to require a deposit. Congress purposed to provide a means for preserving a business which because of overwhelming debt would sink from the scene with all of the ensuing economic consequences. The hope:

ultimate rehabilitation. Nicholas v. United States, 384 U.S. 678 (1966). In short, unless the financial woes are terminal, Congress encourages survival.

While not as secure as the bird-in-hand a cash deposit would be, Vepco nonetheless enjoys exceptional protection under the provisions of the Bankruptcy Act for it holds a priority status whereby its charges are paid as a cost of administration. The Court asked Vepco's Credit Manager if he was aware of any loss Vepco had ever sustained in a chapter case before this Court. He knew of none. The Court is by no means a guarantor and points to this only as it is an indication that the priority status does afford protection.

Vepco's often asserted position that it and it alone should determine when a security deposit should be required is, obviously, rather brash. Indeed, it possesses a monopoly on its particular services and the debtor cannot deal elsewhere if unable to meet Vepco's terms. I am of the opinion there is no conflict between the S.C.C.'s authorization to require a security deposit and the intent of Congress to promote rehabilitation through Chapter XI of the Bankruptcy Act, but should one exist, clearly the Bankruptcy Act is supreme. In the face of the debtor making no deposit, Vepco may not terminate service.

[3]There is almost no case law on the subject and understandably so. Beyond the bankruptcy court being a court of equity with "broad equitable powers," Katchen v. Landy, 382 U.S. 323 (1966), the courts have interpreted the Bankruptcy Act in a broad and expanding fashion to enable them to resolve such an issue as that raised here. Perhaps it was best put in Continental Illinois National Bank & Trust Company of Chicago v. Chicago, Rock Island & Pacific Railway Company, 294 U.S. 648 (1935), when Mr. Justice Sutherland said:

> "The fundamental and radically progressive nature of these extensions becomes apparent upon their mere statement; but all have been judicially approved or accepted as falling within the power conferred by the bankruptcy clause of the Constitution. Taken altogether, they demonstrate in a very striking way the capacity of the bankruptcy clause to meet new conditions as they have been disclosed as a result of the tremendous growth of business and development of human activities from 1800 to the present day. And these acts, far-reaching though they may be, have not gone beyond the limit of congressional power; but rather have constituted extensions into a field whose boundaries may not yet be fully revealed."

It is ORDERED that the application of the Virginia Electric and Power Company for a security deposit be, and it hereby is, denied and dismissed.

Nevertheless, the broad protection afforded debtors by the Bankruptcy Act does not and shall not include a license to abuse creditors. The equities must be somewhat balanced.

It is FURTHER ORDERED that the debtor shall pay each and every monthly Vepco bill immediately upon presentation and that upon the first failure to do so, said debtor shall tender Vepco a cash security deposit of $1,000.00 within ten days of the demand of same.

The clerk shall forward a copy of this memorandum opinion to Gerard P. Rowe, Esquire, attorney for Vepco, Jerrold G. Weinberg, Esquire, attorney for debtor, Secretary of the Treasury, and the Securities and Exchange Commission.

Norfolk, Virginia
December 19, 1974

In re EASTERN ERECTORS, INC.
Alleged Bankrupt
In Bankruptcy
Bankruptcy No. 71-786

E.D. Pa
October 22, 1974

Where debtor filed applications under Rule 115(e) for payment of counsel fees and costs incurred in successfully defending involuntary petition in bankruptcy filed by three creditors who appealed up to Third Circuit, creditors filed answers contending that (1) Rule does not authorize payment of counsel fees where there has been no seizure of property (2) Rule does not apply except when involuntary petition has been filed pursuant to Rule 104(a) or Rule 105(b) or (c), (3) Rule does not apply to involuntary petitions filed prior to effective date of Rule, 10/1/73, (4) Judgment Order of Court of Appeals already adjudicated present issue by providing "costs taxed against appellants" (creditors), (5) Bankruptcy Court's jurisdiction ended when creditors sought review before District Court, *HELD*, dismissing

EXHIBIT "F"

kj

Decision No. 83824

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

101 PLATING CORPORATION, a California corporation,

Complainant,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,

Defendant.

Case No. 9313
(Filed January 5, 1972)

OPINION AND ORDER
UPON FURTHER CONSIDERATION

On January 15, 1974, we issued Decision No. 82341 in which we denied the relief sought by complainant 101 Plating Corporation (101), a Debtor in Possession under Chapter XI of the Federal Bankruptcy Act. 101 sought to permanently enjoin The Pacific Telephone and Telegraph Company (PT&T) from disconnecting telephone service at any of complainant's present telephone numbers for nonpayment of the telephone bills incurred prior to 101's Chapter XI filing. On April 2, 1974, subsequent to the filing of a petition for rehearing of Decision No. 82341 by 101, we issued an order which granted rehearing for the limited purpose of permitting this Commission to further consider the allegations made in 101's petition and by Decision No. 82659 issued April 2, 1974, we stayed the effectiveness of Decision No. 82341 pending our review.

Our review of the entire record in this proceeding, including 101's petition for rehearing, convinces us that 101 as a Debtor in Possession should not be required to pay all unpaid charges incurred prior to its Chapter XI filing in order to continue its existing telephone service.

At the outset it is important to stress that the subject debt amounting to $6,431.29 was wholly incurred prior to 101's Chapter XI filing and that all current telephone charges have been paid by 101 as Debtor in Possession of the estate.

101 has consistently alleged both at hearing and in its petition for rehearing that the supersedure provisions of PT&T's tariff are, in this situation, an unconstitutional interference with the Federal Bankruptcy Act in that they frustrate the rehabilitative goal of the Act, as well as give PT&T an illegal priority of payment above other unsecured creditors. According to PT&T's tariffs, only two alternatives are available to 101 at this point--supersedure with payment of the antecedent debt, or disconnection of its present service. It is agreed by all parties that 101 as a Debtor in Possession could obtain new service upon request at new numbers without referral, but this is available only after disconnection of its present service. 101 placed evidence in the record that service at its existing numbers is essential for continuance of its business and that loss of service, even with subsequent reconnection with new phone numbers, would result in a substantial diversion of business, both temporary and permanent. These facts are unopposed except for a brief statement by counsel for PT&T that such disconnection-reconnection procedure could be done very quickly and without excessive cost to 101.

In Decision No. 82341 we relied principally on two cases[1/] in saying that, since the purpose of the challenged tariff provisions is to insure nonpreferential treatment of subscribers rather than to enforce collection of debts, there is no conflict between the tariff and the Bankruptcy Act.

1/ Kesler v. Department of Public Safety, 369 U.S. 153 (1962); Tracy v. Contractors' State License Board, 63 Cal.2d 598 (1965).

In its petition for rehearing, 101 states that the Kesler case has been specifically overruled by the Supreme Court in the case of Perez v. Campbell, 402 U.S. 637 (1971). Furthermore, since the Tracy case also relied on Kesler, 101 also challenges the value of that case in this proceeding.[2/]

The Kesler case involved the application of Utah's financial responsibility law to a judgment debtor who had succeeded in having said debt discharged in bankruptcy. The Utah statute mandated that under certain circumstances a driver's license would not be issued to such a debtor until the debt was paid, even though the debtor had received a discharge in bankruptcy. The Court in Kesler upheld the statute with the rationale that it was designed to insure that only careful and responsible drivers were allowed on the road rather than to assist in the collection of debts. Therefore, the Court reasoned, since the purpose of the challenged statute was not designed to conflict with the Bankruptcy Act, no unconstitutional conflict with federal law existed.

Perez also involved a financial responsibility statute, this time in Arizona. Here, however, the Court focused not on the purpose of the challenged statute, but on whether the statute in effect frustrated the purpose of the Bankruptcy Act. The Court stated:

> "Thus we conclude that Kesler and Reitz can have no authoritative effect to the extent they are inconsistent with the controlling principle that any state legislation which frustrates the full effectiveness of the federal law is rendered invalid by the Supremacy Clause." 402 U.S. 637, 652 (1971).

2/ The Tracy case has now also been overruled by the California Supreme Court in the case of Grimes v. Hoschler, 12 Cal.3d 305 (1974).

Moreover, the Court in Perez stated:

> "Turning to the federal statute, the construction of the Bankruptcy Act is similarly clear. '[o]ne of the primary purposes of the bankruptcy act' is to give debtors a 'new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'" Local Loan Co. v. Hunt, 292 U.S. 234, 244, 78 L.Ed. 1230, 1235, 54 S CT 695, 93 ALR 195 (1934). (Ibid. at 648)

Our review of the entire record in this proceeding leads us to the conclusion that, in requiring 101 to pay its prefiling debt to PT&T (which agrees that it is a general unsecured creditor) in order to continue 101's present telephone service, a state-created priority of payment is being made for "101's debt in contravention of Section 64 of the Bankruptcy Act. Furthermore, in view of 101's uncontroverted testimony, we believe that disconnection in the event of nonpayment, even though of limited duration pending reconnection with new telephone numbers, would frustrate the overall rehabilitative policy of the Federal Bankruptcy Act as enunciated in Perez.

We note that some difference does exist between the case at hand and the cases in both Perez and Kesler. 101 is not being absolutely deprived of its telephone service as the plaintiffs in the cited cases were being deprived, absolutely, of their driving privilege. 101 can take service at new numbers, as has been suggested. However, 101 has placed undisputed testimony in the record that damage to both its financial condition and its customer good will would occur, and such testimony is unchallenged. In fact, 101 asserts that the continued existence of its financially troubled enterprise is dependent upon the continuance of its present telephone service. In view of the scope of the holdings in Perez and in the case of Grimes v. Hoschler, 12 C.3d 305 (1974) which cases place paramount importance on the purposes of the Bankruptcy Act and their full

effectiveness and their complete fulfillment rather than on the purposes of the challenged statute, we do not view this distinction in the degree of deprivation as persuasive in this case.

Finally, we would add that, although we have found in this case strict application of the tariff would frustrate the rehabilitative goal of the Act, we are also convinced that the action we take here is proper because rehabilitation offers the best possibility that 101 will ultimately be able to pay the debt owed to PT&T. If the debt is paid the utility's other ratepayers will, of course, also benefit.

We view any departure from a tariff provision for a particular customer as a serious matter which depends upon the unique facts of each particular case. Absent special circumstances, the action by PT&T which we herein permit would be viewed as a preference proscribed by Sections 453 and 532 of the Public Utilities Code. However, we believe that the sections were designed to prevent the utility of its own accord from discriminating amongst its various customers. In this proceeding, PT&T is not arbitrarily and illegally being permitted to prefer one customer over another, since 101 has availed itself of the rather drastic remedy contained in the Bankruptcy Act, and will be under the supervision of the Bankruptcy Court.

In view of our holding herein that 101 is entitled to maintain its current telephone service without payment of the antecedent debt, it is unnecessary to reach 101's arguments on the due process afforded 101 by PT&T's disconnect procedures.

FINDINGS

1. The agreed stipulations of facts of the parties is herein adopted as findings of this Commission.

2. PT&T is a general, unsecured creditor of 101.

3. 101's present telephone service has a substantial good will value and 101 would suffer monetary loss in the event of its disconnection, even if followed by reconnection of service with new telephone numbers.

CONCLUSIONS OF LAW

1. The cases of Perez v. Campbell, 402 U.S. 637 (1971) and Grimes v. Hoschler, 12 C.3d 305 (1974) establish the principle that any state legislation, no matter what its stated purpose, which frustrates the full effectiveness of the Federal Bankruptcy Act, is invalidated by the Supremacy Clause of the United States Constitution.

2. Based on the facts of this case, PT&T's supersedure tariff Schedule, Cal. P.U.C. 36-T, 3rd Revised Sheet 72, Rule 23, paragraph (B), which provision requires payment by 101, as Debtor in Possession, of all charges incurred prior to its Chapter XI filing in order to maintain its current telephone service is a state-created priority which contravenes the provisions of Section 64 of the Federal Bankruptcy Act.

IT IS THEREFORE ORDERED that PT&T shall cease and desist from disconnecting 101's present service for failure to pay charges incurred by the debtor prior to its Chapter XI filing.

IT IS FURTHER ORDERED that, should 101 be denied its requested relief by the Bankruptcy Court, then PT&T may pursue all remedies available to it under its currently effective tariffs to recover the outstanding debt.

IT IS FURTHER ORDERED that Decision No. 82341 is hereby rescinded to the extent that it conflicts with this order.

The effective date of this order is the date hereof.
Dated at San Francisco, California, on this 17th day of December, 1974.

Vernon L. Sturgeon
President
William Symons, Jr.
D. W. Holmes

Commissioners

I abstain.
Robert E. McDavid
Commissioner

I will file a dissent.
Thomas Moran
Commissioner

Certified as a True Copy
William E. Johnson
SECRETARY, PUBLIC UTILITIES COMMISSION
STATE OF CALIFORNIA